

THE RIGHT TO DIGNITY AT WORK: CRITICAL MANAGEMENT STUDIES
AND CORPORATE SOCIAL RESPONSIBILITY INSIGHTS INTO WORKPLACE
BULLYING

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Workplace bullying is a severe and pervasive problem in the United States and around the world. Workplace bullying affects millions of workers, leading to lost employment, psychological and physical illness, and injuries. The research on workplace bullying and the laws to protect targets of workplace bullying are both in their infancy. There is a lack of agreement on a definition of workplace bullying, and little research has been completed on remedial methods to address bullying. In the United States there is no real legal remedy for workplace bullying.

The purpose of my research is to gain insight into targets' experiences with workplace bullying in order to better define workplace bullying, to gain an understanding of the outcomes of workplace bullying, to be able to begin to understand potential reasons for workplace bullying, and to be able to begin to develop model solutions to workplace bullying.

This research suggests that the current definitions of workplace bullying are under-inclusive. Requirements of repetitiveness, intent, and a heightened level of severity often exclude many actual bullying acts from definitions of bullying. A broader, more inclusive, human-rights-based definition of workplace bullying is developed in this research.

Further, this research demonstrates that the legal system in the US offers little protection to targets of workplace bullying. The focus of the US law on discrimination rather than dignity and judicial interpretations of the elements of workplace

harassment eliminate the majority of bullying claims from any type of legal protection. Internationally, targets are afforded more protection, but there are still gaps in coverage.

The insight gained into workplace bullying in this research is the first step to solving this problem of abuse in the workplace. Further research should be conducted to explore the reasons for bullying and for the lack of legal response to workplace bullying in the United States. Research should also be conducted to explore various paths to eliminate workplace bullying, including the role of labor unions, alternative dispute resolution, training, and changes to the current legal environment.

BIOGRAPHICAL SKETCH

Jerry Carbo is an associate professor at the Grove College of Business at Shippensburg University. He is also a member of the State Bar of West Virginia. Dr. Carbo has worked in industry as a human resources manager and employee relations manager. Dr. Carbo also has a solo law practice representing employees and employers. Dr. Carbo is married to Betty Carbo, and they have four children together—Suzanne, Adrienne, Anthony, and Giovanni. They also have one granddaughter, Carmella.

I want to dedicate this dissertation to my father, who passed away before I was able to complete this work. He was a great leader and an inspiration to me. Looking back, I also know that he was also a target of workplace bullying, but always worked through it and provided a safe and happy upbringing for myself and my sisters. I hope he is looking down on me and is pleased with this work.

I also want to dedicate this to my children: Suzanne, Adrienne, Anthony, and Giovanni. Suzanne and Adrienne are now old enough to have at least entered the workforce on a part-time basis and, I am sure, have already experienced some of the workplace bullying that is so pervasive. I hope that one day all of my children and their children will be able to work in an environment where their human right to dignity is protected.

ACKNOWLEDGMENTS

It goes without saying that this research is not my product alone. In fact, it could be said that my role in this piece was minor in comparison to that of the research participants and their sharing of experiences. I hope that I have been an acceptable medium through which they have been able to share their thoughts, experiences, and ideas. I would not have been able to accomplish even this role without the help of many, many people.

First, I want to thank all of my committee members, Risa Lieberwitz, James Gross, David Lipsky, and Lance Compa. They have been extremely helpful and patient in this journey. I appreciate the time they have taken in meetings, phone conversations, and e-mails to assist me in this work. I also want to thank them for all of their prior work as professors and researchers who have truly inspired me. I need to give a special acknowledgment to my chair, Risa Lieberwitz. She has spent hours on the phone with me as I have worked on this dissertation from a distance. She has stuck by me while I have learned new methodologies in the course of conducting this research and has been a great help in bringing the different ideas and concepts together for this paper.

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paths to help solve this problem. In particular, I owe a huge debt of gratitude to Amy Hughes. Not only was she a research participant but she also has become a fellow researcher in the area of workplace bullying. She was extremely helpful in bringing some semblance of organization to this piece and keeping me on track to finish.

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Finally, I want to thank all of my family members: my mother for helping to support me throughout my PhD program and taking so much time to read through my entire dissertation and its many incarnations, my sisters for listening to my ideas and providing feedback, and my wife and children for their patience and support. My wife and children have had to endure years of constantly hearing about workplace bullying, and they still continue to listen even today. They have moved with me twice so that I would be able to finish this dissertation, and they have been there for me when I became the target of workplace bullying.

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LIST OF ABBREVIATIONS

The following abbreviations may be used throughout this dissertation:

ADR—Alternative Dispute Resolution

CBA—Collective Bargaining Agreement

CMS—Critical Management Studies

CSR—Corporate Social Responsibility

EEO—Equal Employment Opportunity

EEOC—Equal Employment Opportunity Commission

MBA—Masters of Business Administration

NAQ—Negative Acts Questionnaire

NLRA—National Labor Relations Act

NLRB—National Labor Relations Board

OS—Organizational Studies

OSHA—Occupational Safety and Health Act

SMWT—Self Managed Work Teams

UK—United Kingdom

US—United States

CHAPTER ONE: INTRODUCTION

Introduction

Workplace bullying is a severe and pervasive problem. Workplace bullying can have devastating effects on the targets of workplace bullying, their organizations, and even society. However, research on workplace bullying, particularly in the United States, is in its infancy. While more extensive research has been conducted in Europe, there are still many unanswered questions when it comes to workplace bullying. In line with the infancy of the research, from a legal standpoint, little has been done to address workplace bullying in the United States. According to Namie and Namie, 75% of cases of workplace bullying fall outside of any EEO statutory protection.¹ Further, tort claims have been, at best, an ineffective remedy for workplace bullying.² There have been some international responses to workplace bullying including statutory responses in Sweden, France, and Quebec and common law responses in the UK, Australia, Germany, and other countries. To fully address workplace bullying we must still gain a better understanding of bullying in the workplace, including what this term means, why it occurs, and how to combat it.

While Randall explains that an “agreed definition of bullying do[es] not exist,”³ according to Farrington, “there is widespread agreement that bullying includes several key elements: physical, verbal or psychological attack or intimidation that is intended to cause fear, distress or harm to the victim; an imbalance of power . . .

¹ GARY NAMIE & RUTH NAMIE, *THE BULLY AT WORK* Ch. 8, at 109 (Sourcebooks, Inc. 2003).

² David C. Yamada, *The Phenomena of Workplace Bullying and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEORGETOWN L. REV. 3 (Mar. 2000), and David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMPLOY. POL’Y J. 475 (2004).

³ PETER RANDALL, *ADULT BULLYING* Ch. 1, at 3 (Routledge 2005).

absence of provocation . . . repeated incidents.”⁴ Einarsen defines workplace bullying as “all those repeated actions and practices that are directed to one or more workers, which are unwanted by the victim, which may be done deliberately or unconsciously, but clearly cause humiliation, offence and distress and that may interfere with job performance and/or cause an unpleasant working environment.”⁵

While an exact definition of workplace bullying may not be agreed upon, no matter what definition of workplace bullying is used, the outcomes of bullying are consistent—the effects on the targets of bullying can be devastating. These effects can be felt on the job and in the personal life of the victims of bullying. According to Gardner and Johnson, “bullying causes stress-related illnesses that shatter many careers. Anxiety, stress and excessive worry head the list of health consequences for targets, thereby interfering with their ability to be productive at work.”⁶ Keashley and Neuman found that “exposure to bullying is associated with heightened levels of anxiety, depression, burnout, frustration, helplessness, negative emotions such as anger, resentment, and fear, difficulty concentrating, and lowered self-esteem and self-efficacy.”⁷ Bullying has also been linked to symptoms consistent with post-traumatic stress syndrome, suicidal thoughts, and attempts. There is also clear evidence that some victims of bullying end up committing suicide.⁸ According to Davenport and colleagues, “For the victim, death—through illness or suicide—may be the final chapter in the mobbing story.”⁹ According to Einarsen, bullying may be “a

⁴ David P. Farrington, *Understanding and Preventing Bullying*, 17 CRIME AND JUSTICE (1993), at 384.

⁵ Stale Einarsen, *The Nature and Causes of Bullying at Work*, 20 INTERNATIONAL JOURNAL OF MANPOWER (1999), at 17.

⁶ Susan Gardner & Pamela Johnson, *The Leaner, Meaner Workplace: Strategies for Handling Bullies at Work*, 2001 EMPLOYMENT RELATIONS TODAY, at 28.

⁷ Loreleigh Keashley & Joel H. Neuman, *Bullying in the Workplace: Its Impact and Management*, 8 EMPL. RTS. & EMPLOY. POL’Y J. 335, 346 (2004).

⁸ CHARLOTTE RAYNER, HELGE HOEL, CARY L. COOPER, *WORKPLACE BULLYING: WHAT WE KNOW, WHO IS TO BLAME, AND WHAT WE CAN DO* Ch. 3, at 51 (Taylor & Francis 2002).

⁹ NOA DAVENPORT, RUTH DISTLER SCHWARTZ, & GAIL PURSELL ELLIOT, *MOBBING: EMOTIONAL ABUSE IN THE AMERICAN WORKPLACE* Introduction, at 33 (Civil Society Publishing 2002).

more crippling and devastating problem for employees than all other work-related stress put together . . .”¹⁰

Bullying studies have shown a clear connection between health and bullying. Health outcomes for the victims have included anxiety, depression, insomnia, nervous symptoms, melancholy, apathy, socio-phobia, and post traumatic stress disorder symptoms.¹¹ Further, these health effects can be very pronounced, even early on in a bullying scenario.

Davenport and colleagues, who describe mobbing as an escalating process, have divided such a process into degrees. At each degree there are different effects on the victim:

- First degree—crying, occasional sleep difficulties, irritability, lack of concentration
- Second degree—high blood pressure, persistent sleep difficulties, gastro-intestinal problems, concentration difficulties, excessive weight gain or loss, depression, alcohol or drug abuse, avoidance of the workplace, uncharacteristic fearfulness.
- Third degree—severe depression, panic attacks, heart attacks, other severe illness, accidents, suicide attempts, violence directed at third parties.¹²

In a survey of Quebec workers, Angelo Soares found that “the average psychological distress score” of victims of bullying was 140 percent higher than non-victims. Further, 45.5 percent of bullying victims experienced depression which was severe enough to require medical treatment.¹³

¹⁰ Einarsen, *supra* note 5, at 16.

¹¹ RAYNER ET AL., *supra* note 8 at Ch. 3, at 46–48.

¹² DAVENPORT ET AL., *supra* note 9 Ch. 3, at 89–93.

¹³ Debra Parkes, *Targeting Workplace Harassment in Quebec: On Exporting a Legislative Agenda*, 8 EMP. RTS. & EMPLOY. POL’Y J. 423, 426 (2004).

Not only is workplace bullying devastating to the targets of such behavior, but the effects on organizations may also be disastrous. Workplace bullying has been linked to tragic events such two separate airline accidents that resulted from flight crews being afraid to question pilot decisions and life-threatening and even fatal medical mistakes in health care environments where the stress and fear from bullying interferes with the practice of medicine.¹⁴ Even where effects are not as catastrophic, they can still be devastating for organizational performance. For instance, in a 1998 study by Christine Pearson of surveyed targets, 53% lost work time as a result of the bullying, 37% reduced their commitment to the organization, 28% lost work time trying to avoid the bully, 22% decreased their effort at work, and 12 % actually changed jobs as a direct result of the bullying.¹⁵ According to a UK study, 25% of bullying victims eventually quit their jobs.¹⁶ Gardner and Johnson also point to the lost productivity and higher turnover as examples of employer outcomes of workplace bullying. In fact, in a study by Hoel, victims of bullying estimated that they were working at about 85% of their normal capacity.¹⁷ Further, according to Gardner and Johnson, “When employees perceive they have been treated unfairly at work, they frequently sue their employers.”¹⁸ According to Wilson, 5–6 billion dollars is lost annually in the US alone due to “real or perceived abuse of employees by employers.”¹⁹ A 1998 ILO report concluded that stress at work cost the US \$80 billion per year.²⁰ In fact, according to Coleman, 20% of all workplace disease claims in the United States can be linked to stress.²¹

¹⁴ Keashley & Neuman, *supra* note 7.

¹⁵ Yamada 2004, *supra* note 2, at 481.

¹⁶ Brady Coleman, *Pragmatism’s Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence*, 8 EMPL. RTS & EMPLOY. POL’Y J. 239, 265 (2004).

¹⁷ RAYNER ET AL., *supra* note 8, Ch. 3, at 55–57.

¹⁸ Gardner & Johnson, *supra* note 6, at 29.

¹⁹ Keashley & Neuman, *supra* note 7.

²⁰ Gardner & Johnson, *supra* note 6.

²¹ Coleman, *supra* note 16, at 265.

Workplace bullying has effects that go beyond organizations and spill over into broad societal concerns. According to McCarthy and Mayhew, bullying may even have a link to terrorism. “One could reasonably conclude that corporations that fail to mainstream corporate social and environmental responsibility in management practices and do not implement policies and procedures to prevent workplace bullying/violence are likely to further the displacement, poverty and inequity in which terrorism takes root.”²²

Not only is workplace bullying a severe problem, it is also pervasive. A Michigan study by Keashley and Jagatic found 59% of respondents had “experienced at least one type of emotionally abusive behavior at the hands of fellow workers.”²³ Swedish research in the 90s found that 3.5% of the labor force fell victim to mobbing at any one time.²⁴ Hornstein suggests that 20% of the American workforce faces workplace abuse on a daily basis and 90% will face it at some point in their careers.²⁵ Not only is workplace bullying a pervasive problem, “the incidence and the severity of occupational violence are increasing across industrialized countries, particularly for workers who have significant levels of face to face contact with their clients or customers.”²⁶

In order to reduce the severity, pervasiveness, and growth of incidents of workplace bullying, much must still be done. Research should be conducted to gain a better understanding of the phenomena, to understand the causes and effects of bullying, and to test potential solutions. Further solutions, both voluntary and

²² PAUL MCCARTHY & CLAIRE MAYHEW, *SAFEGUARDING THE ORGANIZATION AGAINST VIOLENCE AND BULLYING* Ch. 5, 80 (Palgrave MacMillan, 2004).

²³ Loreleigh Keashley & Karen Jagatic, *By Any Other Name: American Perspectives on Workplace Bullying*, in *BULLYING AND EMOTIONAL ABUSE IN THE WORKPLACE* 31–61 (S. Einarsen, H. Hoel, D. Zapf, & C.L. Cooper eds., Taylor & Francis 2003).

²⁴ DAVENPORT ET AL., *supra* note 9, at 25.

²⁵ HARVEY A. HORNSTEIN, *BRUTAL BOSSES AND THEIR PREY: HOW TO IDENTIFY AND OVERCOME ABUSE IN THE WORKPLACE* Ch. 1, at 5 (Riverhead Books 1996).

²⁶ MCCARTHY & MAYHEW, *supra* note 22, at 148.

involuntary, will need to be implemented to protect the rights of targets of workplace bullying. The purpose of this study is to explore and examine workplace bullying from a Critical Management Studies (CMS) perspective. As in most CMS studies, this study will produce insight, critique, and a transformative definition.²⁷ However, like many CMS pieces, each of these topics will not receive equal weight. Instead, the primary focus of this dissertation will be to provide insight about workplace bullying. This study will also follow the CSR/Business Ethics analysis as outlined by Archie Carroll and Anne Buchholtz. Specifically, Carroll and Buchholtz suggest that any business ethics analysis should ask 4 questions—“What is?” “What ought to be?” “How do we get from what is to what ought to be?” and “What is our purpose in all of this?”²⁸ In line with the CMS emphasis of insight, this dissertation will focus on the “what is” of workplace bullying. However, I will also explore the questions of “What ought to be?” “How do we get from what is to what ought to be?” and “What is the purpose in all of this?” This study will combine the three CMS objectives with the four CSR questions presented by Carroll and Buchholtz.

The primary focus of this dissertation is to produce insight into workplace bullying. This insight includes gaining a better understanding of what workplace bullying is, gaining an understanding of the details of targets’ experiences with workplace bullying, and from these insights adding to the current definitions of workplace bullying and even producing a new definition of workplace bullying. Alvesson and Deetz suggest that the first step of a critical management study is to gain

²⁷ MATS ALVESSON & STANLEY DEETZ, *DOING CRITICAL MANAGEMENT RESEARCH* Ch. 1, at 16–20, (Sage Publications 2000).

²⁸ From ARCHIE B. CARROLL & ANN K. BUCHHOLTZ, *BUSINESS AND SOCIETY, ETHICS AND STAKEHOLDER MANAGEMENT* Ch. 7, at 250 (7th. ed. South-western, Cengage 2008). I also have added the question of “Why are we here?” I believe that this question is critical to help us to get to where we want to be.

insight at the local level.²⁹ In the research for this dissertation, insight was gained at the local level through written narratives, in-depth interviews with individual targets of workplace bullying, participant observation of a workplace fraught with bullying, and focus groups with targets of bullying. In addition to gaining insight into how workplace bullying can be defined, insight was also gained into the effects of workplace bullying and what has been/is being done to combat workplace bullying. From a CSR standpoint, this is simply understanding the “What is?” This includes the “what is” in terms of what is perceived by the targets of workplace bullying, including what behaviors they perceive, their perceptions of the reasons for such behaviors, and the targets’ views about available remedies. Further explanation about the methodology and reasoning behind this specific study will be provided in Chapters Two through Four.

In Chapter Five, I explore, through written narratives, participants’ thoughts about what the term “workplace bullying” means. These narratives alone indicate that workplace bullying has many different meanings for different individuals. I also explore targets’ experiences with workplace bullying through in-depth interviews. Like the narratives, these experiences vary from target to target. I also explore my own experiences with workplace bullying and the experiences of my co-workers through participant observation of a university where bullying seems commonplace. Through these explorations, I critique the elements of many of the current definitions of workplace bullying and then develop a new definition for workplace bullying that more accurately reflects the experiences of these research participants.

²⁹ “The first task is therefore, to investigate local forms of the phenomena. Critical studies relate empirical themes at hand to the wider historical, economic, cultural and political context, but domination and decisional constraints are often local in form. . . .” From ALVESSON & DEETZ, *supra* note 27, Ch. 1, at 18.

In Chapter Six I explore the outcomes of workplace bullying through the lens of these same narratives, in-depth interviews, and focus groups. These outcomes include the effects on the targets of workplace bullying, their organizations, and even the broader communities and society within which bullying occurs. The outcomes of workplace bullying are as varied as the experiences themselves. In this chapter, I also explore the research participants' responses to workplace bullying as well as their thoughts on potential remedies for workplace bullying.

I also explore the United States legal system for potential remedies to workplace bullying and international responses to workplace bullying. In Chapter Eight, I analyze the lack of statutory or common law remedy available to targets of workplace bullying in the United States. While the statutory responses to workplace bullying in the United States do provide available remedies for workplace harassment that is based on a protected status such as race, color, or gender, this encompasses only a small portion of the incidents of workplace bullying. Further, judicial interpretations setting high burdens of proof of severity, pervasiveness or even "unwantedness" of workplace bullying leave many targets without a remedy. Potential common law claims, such as intentional infliction of emotional distress, have provided little relief for targets of bullying. In Chapter Nine, I explore the much more active responses to workplace bullying in countries such as the United Kingdom, Sweden, and Canada, as well as others. International responses to workplace bullying have included statutory responses in France, Canada, and Sweden, and common law responses in the UK, Germany, and other countries.

In Chapter Eleven, I present a model linking workplace bullying and the experiences and reactions of the targets to potential solutions to workplace bullying. This model is forward-looking and sets out potential areas for future research on workplace bullying and avenues for advocacy of targets of workplace bullying. This

model is built around the theories that were developed in this research. Potential solutions to workplace bullying, including legal responses, alternative dispute resolution processes, employer responses, and educational solutions, are explored throughout this chapter. These potential responses include a role for new legislation and common law arguments that should be further studied and explored. Voluntary organizational solutions are proposed as well as critiqued. Finally, a proposal is established for collective action including the participation of union organizing and collective bargaining as a path to end workplace bullying.

CHAPTER TWO:

MOTIVATION

Why a Critical Management Studies Approach?

There are many ways to explore the world of work. For many organizational studies (OS) researchers, the goal is to discover the practices that lead to organizational effectiveness—most often defined in terms of profits. However, similar to other critical management researchers, it is my position that there are more goals for a corporation than mere profits.³⁰ In this research study I am interested in exploring the impact of work on employee well-being and, in particular, worker dignity. It is my goal to critically analyze the workplace, employer practices, and the working environment from a Critical Theorist, Corporate Citizenship/CSR and Human Rights perspective, to identify barriers to employee well-being and to develop steps to overcome these barriers. In particular, this current research will focus on the role of workplace bullying and how it impacts the rights of targets of workplace bullying.

In framing critical management studies, Adler asks the question, “Critical in the name of whom and what?” According to the CMS mission statement, this focus of “who” and “what” may vary from one research to another.³¹ For this study, my concerns entail whether employees are being exploited; whether their human rights, particularly their right to dignity, are being violated through workplace bullying; and whether employers are upholding their responsibilities to employees and other

³⁰ Paul Adler, *Critical in the Name of Whom and What?* 9 ORGANIZATION (2002), at 387–395.

³¹ The initial mission statement of the Critical Management Studies Workshop of the Academy of Management read: “Our shared belief is that management of the modern firm (and often other types of organizations too) is guided by a narrow goal – profits – rather than by the interests of society as a whole, and that other goals – justice, community, human development, ecological balance – should be brought to bear on the governance of economic activity.”

organizational stakeholders.³² I am interested in establishing a definition and solution to workplace bullying that will lead to an emancipation of employees. In other words, I am critical in the name of employees, and I define the “what” as employees’ human rights, particularly the right to dignity at work, and the right to human needs as defined by Maslow and/or employee voice and emancipation.³³ Further, I seek to identify the structures, practices, or institutions that may be contributing to the exploitation and mistreatment of employees. This will include a critical analysis of US and international legal structures and the organizational structures that support or allow workplace bullying to occur.

I also believe that research should be directed toward “an agenda to help marginalized people.”³⁴ As such I follow the advocacy/participatory claims of knowledge and methodologies. As an attorney representing plaintiffs, I not only want to identify problems but also want to present solutions. Just as much of the traditional OS research is directed at helping organizations to reach greater profit, my research is focused on helping organizations or others to reach different goals such as employee empowerment and emancipation and the enforcement of human rights. If through my research I identify human rights violations, or any other violations of corporate social responsibilities, it is my goal to begin to identify steps to correct these violations and to prevent similar future violations. At the very least I would hope to present possible alternatives to the current systems that have allowed these violations to occur. With

³² I firmly agree with the beliefs of the Critical Theorists such as Alvesson and Wilmott that all research is indeed value-laden. To accept for instance that GDP growth or profits are an acceptable dependent variable of our research holds the value that these are important, perhaps even the only important goals of organizations. Rather than hide the values behind my research I feel it is more honest to explain the values that will indeed impact this research.

³³ For an explanation of Maslow’s theory, see GARETH R. JONES & JENNIFER M. GEORGE, *ESSENTIALS OF CONTEMPORARY MANAGEMENT* Ch. 9, 329–331 (2nd Ed. McGraw-Hill Irwin 2007). Also, these specific needs will be defined in Chapter Four of this dissertation.

³⁴ See JOHN W. CRESWELL, *RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES* (2nd ed. Sage Publications 2003) for a complete description of the various knowledge claims.

this in mind, my target audience encompasses those that can and do make a difference in the philosophy of business—legislators, advocates, activists, educators, and managers. I have chosen to explore workplace bullying and the right to dignity in the workplace, not from a traditional OS position, but rather from an advocacy/critical perspective.

Why Workplace Bullying?

My interest in workplace bullying was triggered by personal and professional reasons and first-hand experiences. In my career in the human resource departments of several Fortune 500 companies, I witnessed the impact that bullying can have on the people of an organization. In one example I saw how a bullying supervisor became the most important issue at the collective bargaining table after his antics had ruined the working environment for numerous direct reports. I also witnessed how a bullying leader in one organization bred other bullying managers and how these bullying managers drove employees out of an organization and eventually to its organizational demise. Many of these employees passed through my office on their way out of the organization, often describing how their managers had not only ruined their working environment but were ruining their lives. I have witnessed first-hand as bullying led to an effective union-organizing campaign, where employees had simply had enough of management's bullying manner in implementing new programs and policies. As an attorney I have represented clients who were devastated by workplace bullying from supervisors and even co-workers, in some instances to the point of nervous breakdowns. I have seen the victims of bullying leave work with absolutely no legal recourse, including, in one case, even having unemployment benefits denied by an unemployment referee who felt that a 6'5", 300 pound supervisor yelling at a 55-year-old diminutive female employee was just part of the normal rough and tumble

environment of the restaurant business. I have personally experienced how damaging workplace bullying can be to employees on the job and in their personal lives, and from this I have a great interest in doing something to alleviate this problem.

My interest in workplace bullying has also grown out of my earlier work as a researcher and attorney in the field of workplace harassment. In 1999, I wrote an article entitled “Sexual Harassment: Is the Media Manipulating the Facts?”³⁵ In the research for this article, I found that the US system of justice often started out by pointing the fingers at the victims of workplace harassment. Even for bullying that is based upon clearly legally protected status, the laws do not provide adequate protections for targets. Further, it is clear that the United States does not provide protection to victims of bullying that is not based on the target’s legally protected status such as race, color, gender, national origin, religion, age, or disability. The Supreme Court has made it clear that Title VII does not create a “civility code.”³⁶ Victims of sexual and other forms of unlawful harassment, as a result, often have their cases thrown out of court on the basis of insufficient evidence of severe and/or pervasive conduct that rises to a judicially mandated legal standard of intimidating or harassing behavior.

Yet the research is clear that workplace bullying is a severe and pervasive problem. Despite this, it is a problem that is not addressed by the American jurisprudence system. Workplace bullying violates the rights of target employees. No person should have to endure bullying to simply make a living.

Finally, as an attorney, I believe that our legal system should, at the minimum, protect individuals’ human rights. However, I further believe that the current US legal system is structured to protect the ownership class and business interests at the

³⁵, Kimberly C. Pellegrino, Jerry A. Carbo II, & Robert J. Pellegrino, *Sexual Harassment: Is the Media Manipulating the Facts?* 8 J. INDIVIDUAL EMPLOYEE RIGHTS (1999–2000), at 1.

³⁶ *Oncale v. Sundowner*, 118 S. Ct. 998 (1998).

expense of labor and individuals. I do not believe that this structure is unintended, and would like to explore this further and how this relates to the prevalence of workplace bullying. In the cases of workplace harassment, unlawful or otherwise, that I have witnessed or studied, the targets' human rights to dignity were clearly violated. In too many of these cases, there was no legal redress. As a result of this lack of legal remedy, I see a strong need to explore model solutions to workplace bullying.

The Role of Theory in this Study

Instead of going into this study with predetermined theories, I want to leave myself as open as possible to develop theories after listening to the participants' experiences and learning from these experiences. While there are no set theories that will be tested in this study, I do start out this research with some broad hypotheses. My first hypothesis is that there are many different forms of bullying and that workplace bullies will use many different methods or tools for bullying. For instance, while the prototypical schoolyard bully may also exist in organizations, other forms of bullies, while not as overt, also exist in organizations. These "covert" or "sneaky" bullies may use organizational policies to intimidate, threaten, or harass targets. Others may use rumor or innuendo, or ostracizing of co-workers or employees. These different forms of bullying will lead to different results and outcomes to the different targets of workplace bullying. In Chapters Five and Six of this dissertation I show the many faces of the diverse phenomena of workplace bullying.

My second hypothesis is that different targets will take different routes to deal with the bullying, with varied levels of success. For instance, low-wage workers may not have the knowledge or the access to address even unlawful forms of bullying via the legal system. Other workers may not take advantage of potential remedies because they may view these steps as a sign of weakness, or they may view bullying as just

part of the natural and accepted working environment. These responses to workplace bullying are explored in Chapter Six.

Finally, I hypothesize that the current lack of remedy in the United States is more than simply an ignorance of the problem. Rather, this lack of response is an example of lack of concern for human rights in the US legal system, the unwillingness of judges and legislators to respect individual employee rights, and the continued unwillingness by judges and legislators to cede any power from corporations and the business ownership class. In essence, this lack of response to workplace bullying is simply another example of the US legal system protecting corporate interests over human rights. While the focus of this dissertation is on insight, I also begin to set out potential theories of why the US has not addressed workplace bullying through any formal legal methods. The US legal system is discussed as part of the foundation section of this dissertation in Chapter Four, the law around harassment and bullying is explored in Chapter Eight, and the potential reasons for a lack of legal remedy for workplace bullying are briefly addressed in Chapter Ten.

In addition to the researcher's hypotheses, other relevant and existing theories are used in the critique and transformative redefinition section of my research. These theories are not tested, but are related to workplace bullying to set a direction for future research. These theories come from areas such as Alternative Dispute Resolution, law and society, collective bargaining, business and society, and organizational behavior. These theories may indeed play an important role in the future critique and transformative redefinition research on workplace bullying. However, it is not the intent of this study to test any one of these specific theories, and the methodology and research strategies have not been developed to do so.

Beyond the exploration of these hypotheses, this research has also been used to develop several theories. The first of these theories is discussed in Chapter Seven. This

theory is that the current internal and external definitions of workplace bullying lead to an underreporting of bullying. This theory was developed in response to participants' experiences with workplace bullying and their hesitancy to label these experiences as workplace bullying. The second theory developed here is that the key path to eliminating workplace bullying is through an equalization of power. The theme of power imbalance is discussed in Chapter Seven, and again from the discussion with research participants this theory of power was developed. Related to this theory of the potential solution to bullying, the third theory I have developed is that there is a linkage between support for forming a union and the experience of being a target of workplace bullying. This theory is further discussed in Chapter Seven and again in a model in the concluding chapter—Chapter Eleven. This theme of the labor movement and organizing had clear support from research participants during the interviews and focus groups. Finally, based on the research participants' experiences and my international and comparative review of the legal responses to workplace bullying, I have developed the theory that the lack of a US legal response is a direct effort to maintain the current power structure. This theory is further discussed in Chapter Ten and in the conclusion. Further, the relationship between these four theories is discussed in the conclusion to this dissertation and within the model proposed in Chapter Eleven.

CHAPTER THREE: METHODOLOGIES AND BOUNDING THE STUDY

Reasoning for Qualitative Methods

There are a number of reasons why this study will be conducted as a qualitative study. First, the phenomena to be studied here—the meaning and solutions to workplace bullying—are in need of rich, deep study. According to Creswell, when a “concept or phenomenon needs to be understood because little research has been done on it, then it merits a qualitative approach.”³⁷ As stated earlier, the workplace bullying research and, in particular, research on remedying workplace bullying is very limited, and there is a need for a deeper understanding. According to Rayner et al., if we are to begin to explore remedies for workplace bullying, the “future work is likely to move away from large surveys to qualitative work involving interviews and case studies. Such methodologies can gather information of a richer kind from which we can build theories and then test them.”³⁸ The research questions in this study focus on a deeper understanding of targets’ perceptions of bullying and the potential application of remedial measures. In both cases, the research is in its infancy and a qualitative approach is needed.

Second, this study is focused on solutions and actions, as is all participatory/advocacy research. The type of theory development in qualitative research is more “substantive theory” that “has as its referent specific, everyday real world situations . . . and hence usefulness to practice often lacking in the theories that cover more global concerns.”³⁹ Thus qualitative theory development is closely aligned

³⁷ CRESWELL, *supra* note 34, at 22.

³⁸ RAYNER ET AL., *supra* note 8, at 186.

³⁹ SHARON B. MERIAM, *QUALITATIVE RESEARCH AND CASE STUDY APPLICATIONS IN EDUCATION*, Ch. 1, at 17 (Jossey-Bass Publishers 1998).

to the goal of the advocacy approach to research of finding real-world solutions to actual problems identified.

Third, in critical management research each individual's point of view is important. As data is accumulated through quantitative methods, individual voices and stories are lost. The efficacy of the various solutions to workplace bullying should be evaluated from the diverse viewpoints and experiences of all research participants, not simply the most common. As discussed above, one hypothesis of this study is that there will be greatly varying experiences with workplace bullying. In order to fully understand these variances, a rich, in-depth qualitative approach is necessary.

Research Methodology

To gain the in-depth, local level of understanding necessary to fully understand the experiences of targets of bullying and to begin to develop models to address workplace bullying, I relied primarily upon qualitative methodologies. In the course of this study, I engaged in a number of qualitative research methods, including participant observation of my own work setting as a faculty member, in-depth interviews of self-identified targets of workplace bullying, focus groups consisting of participants from the in-depth interviews, and written narratives and on-line discussion postings of business school students in three separate classes I taught.

Participant observation can be defined as the heart or basis of all qualitative research or as a specific qualitative method.⁴⁰ According to Merriam, as a method, participant observation is “schizophrenic. The researcher attempts to be involved but not overly involved, may be concerned with whether they are at the right place at the right time, and may be concerned with overly influencing what they observe.”⁴¹ In my

⁴⁰ HARRY F. WOLCOTT, *WRITING UP QUALITATIVE RESEARCH* Ch. 4 (2nd ed. Sage Publications 2001).

⁴¹ MERIAM, *supra* note 39, Ch. 5, at 103.

participant observation at my own work setting I shared these and other concerns and am well aware that how I reacted to bullying in my workplace including how I interacted with bullying I witnessed, and the targets who approached me most likely had an impact on the workplace environment. For instance, in this workplace I was actively involved in the AFT teachers' union. When I was approached by fellow faculty members or other colleagues who had been bullied, I would indeed suggest they join the AFT or even suggest some methods for assistance rather than allow the bullying to run its course. Further, this working environment was extremely busy, hectic, and decentralized. My interactions were often limited to a select group of faculty and staff who worked in my building and the surrounding buildings. However, this observation was not the main focus of this study, but rather I view my experiences as supplementing and perhaps supporting the other pieces of this study. Further, I believe my own experiences with what I perceived to be workplace bullying gave me a more complete understanding of the other participants' experiences.

In addition to this participant observation, I also conducted in-depth, qualitative, individual interviews of 16 selectively identified volunteer research participants. These participants identified themselves as targets of bullying through surveys and/or by responding to a call for participants. The backgrounds of all 16 of these participants are listed below. In the course of these interviews, I asked open-ended questions. Most often I started by asking first what workplace bullying meant to the participant. My initial thought was that participants would share a definition of workplace bullying. However, in most cases, the participant immediately began to share his/her own experiences with workplace bullying. Beyond this initial question most of the interviews took their own individualized paths based on the participant's responses. However, in each interview, I asked participants about their experiences, what they perceived as the reasons for their experiences, the outcomes of their

experiences, their perception of available remedies, and what remedies they felt would be effective. However, if the participant took the questions in a different direction, I would allow them to continue down this different path. This allowed me to get a better picture of each participant's perceptions. These interviews lasted anywhere from 45 minutes to 2 hours.

Initially, my goal was to interview 25 targets of workplace bullying.⁴² According to Seidman, there are two criteria for determining the right number of research participants in a qualitative interview study. The first is sufficiency.⁴³ In this case, my question was whether the current definitions of workplace bullying adequately covered the experiences of the targets of workplace bullying. Once I had identified one experience that fell outside of the current definitions, this could have been considered sufficient. This occurred during the very first interview. In fact, in each successive interview I found more and more problems with the current definitions of workplace bullying. By the time I reached the interview with the tenth research participant, I thought that I may have reached the second criteria set out by Seidman—saturation. I found that in each interview I continued to get unique experiences, but by this point I felt that enough common themes had emerged that, for my purposes, comprised a “completeness” to the information. However, I had already scheduled interviews with four other volunteers. Further, I wanted to make sure I had enough interviewees to set up focus groups. Two additional interviewees approached me wanting to share their experiences. I did, of course, interview these individuals. However, at this point I did not actively recruit any additional participants.

⁴² As I am new to qualitative research, I looked to experts to initially give me an idea. In his book *INTERVIEWING AS QUALITATIVE RESEARCH* (Teachers College Press 2006), IRVING SEIDMAN refers to Douglas as being “bold” enough to even suggest an exact number of interviews—“If he had to pick a number, he said, it would be 25 participants.” Ch 4, at 55.

⁴³ *Id.* Ch. 4, at 55.

In addition to these interviews, I conducted focus groups as a means to further understand the experiences of the research participants and to allow for the participants to reflect on their own experiences via discussions with other targets of such treatment. Focus groups were developed from this same group of 16 volunteers. A third focus group centered on the general atmosphere of the University and the local AFT and consisted of active members of the AFT, several of whom were also interview participants. Each focus group was formed to assure the confidentiality of the research participants. Members of the focus groups were given the opportunity, prior to the focus group, to select whether or not they wanted to participate in the focus group based upon the background of the other members of the group.

The first two focus groups each were comprised of four different participants from the interview phase of this research (8 total participants) and lasted 4 hours. The third focus group consisted of 2 AFT members who were not part of the interview process and three university employees who did engage in the interview phase as well. This focus group also lasted about 4 hours. In each of these focus groups I asked three broad questions—“What is workplace bullying?,” “What were your experiences and reactions to workplace bullying?,” and “What should be done about workplace bullying?” Toward the end of each focus group we also discussed various definitions of workplace bullying, including the definition developed in this research. During the course of the focus group I attempted to be as passive an observer as possible and took the role of a facilitator of the discussion amongst other participants.

In both the in-depth interviews and the focus groups I tried to assure that my own personal beliefs and biases did not overly influence the groups or individuals. I am a strong supporter of the labor movement, and this may have had some influence on the groups and even individual responses to the possibility of labor organizing as a solution to bullying. However, during the interviews and focus groups, I never

explicitly stated my support for this solution to workplace bullying. In fact, initially I expected that ADR-type solutions might emerge as the most potentially effective remedies. During the interviews and focus groups, at most I would mention unions as a possible solution in a list with other possible solutions including ADR, legislation, employer-based systems, etc. For each of the potential solutions, responses, etc. that I asked participants to share, I attempted to stay as neutral as possible. However, I do believe it would be intellectually dishonest to suggest that my own personal viewpoints as the researcher did not affect the results in some manner.

Finally, as part of class assignments students in one of my organizational behavior courses were asked to define workplace bullying. These written narratives were utilized as part of the insight section of this dissertation. These narratives gave me the first idea of exactly how non-researchers think of workplace bullying. It helped to build a foundation about what these terms really mean to people who may be unfamiliar with the term or any of the research in this area.

In terms of the face-to-face research participants, all volunteers were first asked to complete a survey that is a modified version of the NAQ.⁴⁴ This survey is posted in Appendix B. This survey was used to spur interest in the topic of workplace bullying and to identify potential interview participants. These survey participants were volunteers from various organizations, other MBA and undergraduate courses, and respondents to postings of a call for participants. From this survey information, participants were selected for the next stage of the research—qualitative interviews.

⁴⁴ Einarsen and Raknes developed the Negative Acts Questionnaire (NAQ) in 1997; Einarsen, S. & Raknes, B.I. (1997) Harassment at work and the victimization of men. *Violence and Victims*, 12, 247–63. Under the NAQ, which also includes a self-report question, a participant is defined as a target of bullying if they have experienced one of the listed behaviors over the last six months on a regular basis. The NAQ has become the more standard survey and is being used in countries (e.g. Sweden, UK). Einarsen and colleagues (2003) have found the NAQ 20+1 measurement to be a valid and reliable measurement instrument for workplace bullying and have found that the NAQ has been adequately adapted to the US.

Specifically, those volunteers who indicated that they have been the targets of mistreatment in the workplace that has been defined as bullying by various researchers were selected for more in-depth interviews.

The data was collected via digital tape recorder in all cases where research participants agreed to such recording. In other instances, data was collected via field notes. Data was analyzed via a constant comparative approach to define emerging themes and also to identify differences in targets' experiences. Targets' experiences were also compared to current legal standards related to workplace bullying, including legal definitions of workplace harassment and intentional infliction of emotional distress (IIED). Data was also verified and validated through follow-up interviews with the research participants after such data was analyzed.

The Research Participants

Various groups of research participants participated in this study. Sixty participants completed a survey based on the NAQ. These participants all had work experience and were comprised of various employees from a mid-sized rural university, working MBA students at this same university, working undergraduate students from this university, and volunteers from the surrounding community. Students in an undergraduate organizational behavior course participated in this study by providing written narratives of their definition of workplace bullying. These responses were part of the course assignments in this class. Graduate-level and upper-level undergraduate students were asked to respond to various workplace harassment cases and the appellate decisions of these cases as part of a bonus assignment in a graduate-level course and a senior-level employment law course.

After the survey, 16 of the survey respondents participated in in-depth interviews concerning workplace bullying. These respondents included:

1. A female immigrant with an international law degree working on her MBA. She was employed as a hotel worker at a large international upscale hotel chain.
2. A Caucasian female in her late teens working her first job as a food service worker at a nursing home. She was also a full-time undergraduate student.
3. A Caucasian female in her early to mid-twenties working as a waitress part-time while completing her undergraduate degree full time.
4. A Caucasian middle-aged female working at a university and completing her undergraduate degree. She had experienced bullying at a prior employer.
5. A Caucasian male former soldier in his late twenties.
6. A Caucasian male faculty member in his early sixties who was retiring at the end of the school year.
7. A Caucasian male faculty member and active AFT member in his early sixties.
8. A Caucasian female university staff member and faculty member in her early thirties.
9. A Caucasian female university staff member and adjunct faculty member in her mid-thirties.
10. A Caucasian male MBA student and former telemarketing employee in his late thirties.
11. A Caucasian male MBA student in his early twenties, working as an intern at a financial services company.
12. A Caucasian middle-aged female MBA student and former office manager at an optometrist's office.
13. A Caucasian female middle-aged MBA student currently working as a CFO for a local company.

14. A male, African-American undergraduate student in his early twenties, working part-time at a big-box warehouse store.

15. A female mid-thirties Caucasian, employed by the local school district as a physical therapist.

16. A Caucasian female in her late thirties, with an undergraduate business degree, working in a professional position in the oil and gas industry.

The female university staff member in her early thirties, the female hotel worker, and the late-thirties MBA student and former telemarketing employee participated in the first 4-hour focus group/learning circle. The female employee in the oil and gas industry, the optometrist's office manager, one of the food service workers, and the former soldier engaged in a second focus group, and three of the university employees as well as two other AFT members engaged in a third focus group/learning circle.

Limitations of the Study

There are several limitations to this study that should be pointed out. First, as Seidman has noted, even in the best-case scenario for qualitative interviews, we can never have a full understanding of the research subjects' experiences, because "to do so would mean we have entered into the other person's stream of consciousness and experience what he or she has."⁴⁵ This study is based on participants' perceptions and not independent research observations other than the limited participant observations made in the university setting. Therefore, the researcher will never have a complete understanding of each individual experience.

Second, "[i]n a qualitative study the investigator is the primary instrument for gathering and analyzing data [and] . . . as [a] human instrument is limited by being

⁴⁵ SEIDMAN, *supra* note 42, Ch. 1, at 9.

human—that is mistakes are made, opportunities are missed, personal biases interfere.”⁴⁶ Of course, in this case, much of this is hopefully accounted for in the motivation and researcher background piece of this dissertation, and I hope that these personal biases have at least been explained fully to allow the reader to reach his/her own conclusions. Further, collected information also has been validated in this study through debriefing of participants and follow-up prior to publication of any information.

Third, if the researcher’s hypothesis that there are many forms of workplace bullying proves true, the researcher will most likely not be able to study all of these various forms. The participants in this study are geographically centrally located, and as such may experience a type of bullying that is limited to this area. Responses to and the remedies for workplace bullying may be limited or specific to this geographic area. For instance, the study is being conducted in a state within the jurisdiction of the federal Fourth Circuit Court of Appeals, an extremely conservative court. This may limit legal remedies for bullying based on race, gender, or another protected status available in other states.

Finally, it is suggested that qualitative studies may never lead to universal conclusions.⁴⁷ I believe that this would be a limitation of any study that focuses on people or any study where humans are the research subjects. However, in this case conclusions can be drawn about the unique experiences of each of these research participants, and these will in turn lead to implications and recommendation. This qualitative study will provide rich, in-depth information at a personal level that even the most rigorous quantitative study would ignore. These insights and recommendations will provide a sound basis for potential solutions and future research

⁴⁶ MERIAM, *supra* note 39, Ch. 1, at 20.

⁴⁷ WOLCOTT, *supra* note 40, Ch. 5, at 124.

on workplace bullying. I summarize the findings and discuss implications, rather than conclusions, at the end of each section of this dissertation.

CHAPTER FOUR:

FOUNDATION SECTION: CRITICAL IN THE NAME OF WHOM AND WHAT?

An important first step of this paper is to define the critical nature of this paper—to answer Adler’s question of “Critical in the name of whom and what?” This also will answer, at least in part, Carroll’s question of “What should be?” In this case, the “whom” is pretty straightforward—the purpose of this dissertation is to look at the interests of working people. This paper focuses on any and all employees. There are a number of suggested “whats” that can be studied. For instance, in the CMS mission statement cited in footnote 31, goals such as “justice, community, human development and ecological balance” should all be studied.⁴⁸ Corporate Social Responsibility researchers such as Carroll and Matten and Crane, human rights researchers and documents, and the Catholic Social Tradition also present dependent variables beyond firm profits that should be important to research on the world of work.

According to Archie B. Carroll’s model of CSR, managers, corporations, and employers in general have four levels of responsibility: capital, legal, ethical, and philanthropic responsibilities. Carroll also suggests that organizations owe these duties to a broad group of “stakeholders” that includes anyone with a “stake, claim or interest in the operations or decisions of the firm.” Of course, at times managers will have to balance the interests of these different stakeholder groups as their interests will at times conflict. Only managers who truly consider all stakeholders and all four levels of Carroll’s pyramid would be considered moral managers and hence their organizations socially responsible.⁴⁹ Therefore, one possible way to study the world of work is to ask whether the outcomes of managerial actions meet these responsibilities.

⁴⁸ See the CMS Mission Statement at note 31.

⁴⁹ Archie B. Carroll, *The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders*, 34 BUSINESS HORIZONS 39–49 (1991).

As my research is critical in the name of employees, this would mean that my question would be, “are these practices meeting employers’ financial, legal, ethical and philanthropic responsibilities that they owe to their employees?” While this model presents an interesting option, I do not believe that this model provides enough protection to employees to fully describe my answer to the “critical in the name of what?” As will be discussed in Chapter Eight, an employer that meets their legal obligations to employees in the United States may provide little or no protection to victims of workplace bullying and harassment. Further, according to Carroll, ethical standards are those standards that meet societal expectations.⁵⁰ Unfortunately, as will be discussed in Chapter Five, too often management by intimidation, sexually harassing behavior, and other forms of bullying seem to be readily accepted parts of work. While Carroll’s model goes beyond the typical OS research, it does not address employees’ rights to be free from bullying.

The Catholic Social Tradition offers an additional model of “what should be” and another possible answer to the question of “critical in the name of what?” According to researcher Michael Naughton, companies that place too much focus on profit will not be following the Catholic Social Tradition.⁵¹ Instead, “[b]ecause organizations have a powerful formative effect on people, everything within the organizational realm must be judged in light of whether it protects or undermines human dignity.”⁵² This model requires that employers go beyond meeting legal and ethical responsibilities to employees, addressing the role of employers to focus on employees’ human right to dignity. It is from here that I am able to develop my answer to the question of “critical in the name of what?” My primary focus is on the human

⁵⁰ *Id.*

⁵¹ Michael Naughton, *The Corporation as a Community of Work: Understanding the Firm within the Catholic Social Tradition*, 4 AVE. MARIA L. REV. 33, 40–41 (Winter 2006).

⁵² *Id.* at 62.

right to dignity at work, but it is also important to explore other human rights that are violated when an employee is bullied at work.

As human beings, all of us have certain rights. These rights are thus recognized as human rights. In discussing human rights, there is a general consensus that human rights are rights one has by virtue of the simple fact of being a human. Further, most would agree as the result of this that these rights apply to all humans regardless of race, color, gender, national origin, immigration status, etc. Taking this a step further, the key to human rights is that the enforcement and enjoyment of these rights are what make us human in the first place. Human rights exist not only as the requisites for health but to fulfill those needs for a life worthy of a human being.⁵³ Therefore, those whose human rights are violated live in a manner that is less than human, a circumstance that tears at the very fabric of their being, and would even bring in to question the purpose of their being. Further, these rights apply to all. This is readily recognized in the UN's Universal Declaration of Human Rights:

Article 1: All human beings are born free and equal in *dignity* [emphasis added] and rights.

Article 2: Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind.⁵⁴

At the foundation of these human rights is the right to dignity. According to Rene Cassin, a French legal scholar and Nobel laureate, who helped to draft the Universal Declaration of Human Rights, “the four foundation blocks of the declaration [are] ‘dignity, liberty, equality and brotherhood.’”⁵⁵ According to the Vienna

⁵³ JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS: IN THEORY AND PRACTICE* Ch. 1, 14 (2nd ed. Cornell University Press 2003).

⁵⁴ Universal Declaration of Human Rights, G.A. Res. 217A III of December 10, 1948, *as found at* <http://www.un.org/Overview/rights.html>

⁵⁵ MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* Ch. 4, at 222 (University of California Press 2004).

Doctrine, “all human rights derive from the dignity, and worth inherent in the human person.”⁵⁶ Dignity also “plays an important role in ensuring a standard for the protection of civil and political rights and social and economic rights in Europe.”⁵⁷

Dignity can be defined as “the quality or state of being honored or esteemed.”⁵⁸ There are many different conceptions of the meaning of dignity. For instance, Toth suggests that the right to work, right to equal pay, just and favorable working conditions, and freedom of association may all be included within the definition of dignity as it relates to work.⁵⁹ From a sociological standpoint, “dignity has been defined as a sense of self-worth.”⁶⁰ In other words, dignity is the state of having value, and in this case value as a human being. Not only is this state of having value a human right, but it is one of the foundations for all human rights. Human rights are about more than protecting our physical lives; they are about protecting the meaning of our lives, and dignity lies as at least part of this foundation of human life.

Human rights include not only those things that are needed to live, but those that are needed to live as humans. Maslow’s hierarchy suggests that human *needs* are many and varied. These needs include not only the basic needs, such as the need for food and water (physiological needs), but also include higher level needs such as esteem, acceptance and, ideally, self-actualization.⁶¹ Maslow himself recognized these needs as a legitimate basis for human rights.⁶² Other human rights scholars have also

⁵⁶ Vienna Declaration and Programme of Action, A/CONF.157/23, (July 12, 1993) as found at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En). The Vienna Declaration and Programme of Action was developed at the World Conference of Human Rights in 1993.

⁵⁷ Mariann Arany Toth, *The Right to Dignity at Work: Reflections on Article 26 of the Revised European Social Charter*, 29 COMP. LAB. L. & POL’Y J. 275 (2008).

⁵⁸ MERRIAM-WEBSTER DICTIONARY, NEW EDITION (Merriam-Webster, Inc. 2004).

⁵⁹ Toth, *supra* note 57, at 277.

⁶⁰ *Id.* at 282.

⁶¹ See JONES & GEORGE, *supra* note 33, Ch. 9.

⁶² DONNELLY, *supra* note 53, at 13.

agreed that Maslow's work at least sets out a number of those things that should be included in human rights.⁶³

It is hard to imagine any more important rights than those that make us human. According to Donnelly, "Claims of human rights are the final resort in the realm of rights; no higher rights appeal is available."⁶⁴ As a result it is difficult to imagine any more important role of laws and government than to protect these rights. Confucius readily recognized this type of protection as the purpose of a government. "A benevolent government should provide people with what is really important to them and discourage the rich from taking complete control of society's wealth."⁶⁵ The importance of human rights is so clear that every religion of the world has at least some measure of these rights and every major religion has contributed to our understanding of these rights.⁶⁶ The United States has recognized the existence of these rights and the governmental role in protecting these rights since the country's founding. This is evidenced by Thomas Jefferson's eloquent passage from the Declaration of Independence:

We hold these truths to be self-evident; that all men are created equal; that they are endowed by their creator with [inherent and] inalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men . . .⁶⁷

It could be argued that the very purpose of any form of government is to protect these human rights. Unfortunately, for workers today, this focus on human rights is lacking, particularly so in the United States.

⁶³ *Id.*

⁶⁴ *Id.* at 12.

⁶⁵ *Id.*

⁶⁶ ISHAY, *supra* note 55, at 5.

⁶⁷ Thomas Jefferson, The Declaration of Independence, July 4, 1776, in THE THOMAS JEFFERSON READER, at 21–27 (Konecky & Konecky).

Thomas Jefferson's focus on human rights upon which the United States was founded has since vanished from the legal system and, particularly, from the legal system that regulates the American workplace. According to Professor James Gross, the concept of human rights, particularly workers' rights as human rights, has never been an important influence in the making of US labor law or labor policy. Even beyond the borders of the US, international human rights organizations, human rights scholars, and labor organizations and advocates have given little attention to workers' rights as human rights.⁶⁸

However, this lack of focus on human rights in today's global economy is even more disconcerting. As we move to a global economy, protecting human rights becomes even more difficult and more relevant to the workplace. Within the context of the increased power of international economic organizations such as the World Trade Organization (WTO) and the increased power of multi-national corporations (MNCs), "a morality founded on some set of human rights principles may well be the only effective way to confront the divisions by class, race, ethnicity and gender within the contemporary global setting."⁶⁹ As we rely on and focus more on markets to solve societal problems, we become less able to address human rights. "[M]arkets foster efficiency, but not social equity or the enjoyment of individual rights for all."⁷⁰ Failure to enforce a human rights standard leaves employees at the whim of the employer and markets to meet even their most basic needs.

Under the Universal Declaration of Human Rights, Article 25, "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social

⁶⁸ James A. Gross, *Incorporating Human Rights Principles into US Labor Arbitration: A Proposal for Fundamental Change*, 8 EMPL. RTS. & EMPLOY. POL'Y J. 1 (2004).

⁶⁹ Gideon Sjoberg, Elizabeth Gill, & Norma Williams, *A Sociology of Human Rights*, 48 Social Problems 11-47 (2001), at 12.

⁷⁰ DONNELLY, *supra* note 53, at 201.

services. . . .” As the global economy becomes more and more of a private market based on the US economic model, and as social safety nets are removed from governmental systems, access to this standard of living comes only through work.⁷¹ As more people around the globe work for other people and engage in work for large MNCs, the protection of even these fundamental needs becomes more and more important. Because meeting this standard of living will only come through gainful employment, the right to such employment becomes an imperative human right. Further, the protection of human rights while at work likewise becomes imperative.

In the United States, the protection of the rights to economic and health protections has been of importance at least since the birth of the Industrial Revolution and the move away from self-sustaining farming to working for others, and today these rights at work are ever more important. Therefore, a human right to the work necessary to meet one’s basic needs should be viewed as a basic human right that should be protected by the national governments and those institutions with global power, whether they be corporations, NGOs, or governing bodies.

However, a human right to work and to just and favorable conditions of work goes beyond the right to earn a living necessary for one’s survival. As Donnelly appropriately states, work is also important to the attainment of goals necessary for human dignity.⁷² These goals may also be described as higher-level human needs (the needs necessary to live as a human being) and can again be described by reference to

⁷¹ See NOREEN HERTZ, *THE SILENT TAKEOVER: GLOBAL CAPITALISM AND THE DEATH OF DEMOCRACY* (Harper Collins 2003), and NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* (Metropolitan Books 2007). In both of these books, the authors outline the spread of an extreme form of capitalism preached by the Chicago school economists that consists of eliminating all social safety nets and the privatization of all businesses including traditional governmental roles. Both books also describe the role of the WTO and IMF in spreading these practices through the placement of these conditions on loans.

⁷² *Id.*

Maslow's hierarchy of needs, specifically Maslow's needs for esteem, growth, and self-actualization.⁷³

To meet these needs there must not only be a focus on the right to work itself, but also to certain conditions of work. Americans work the longest hours of any industrialized country, working on average 50 hours per week, while also having less time off, including maternal leave, parental leave, holidays, and vacation.⁷⁴ Putting that into perspective, if the average American sleeps 8 hours per night and works an average of 50 hours per week, she will spend 45% of her waking life at work. This worker does not abandon her human rights during 45% of her waking life. "[T]he right to work is arguably as important as most basic civil and political rights; the psychological, physical, and moral effects of prolonged enforced unemployment may be as severe as those associated with denial of, say, freedom of speech."⁷⁵ Not only may denial of work be devastating by making it impossible to meet a decent standard of living, but the conditions of work may be just as important to human well-being. A human right is a right 100% of the time, so these rights must be protected both inside and outside of work.

It is unacceptable to suggest that any human would have to spend 45% of his/her waking life as living a less-than-human existence. With the understanding that employees spend 45% of their waking lives at work, it would be difficult to imagine meeting the human needs for esteem and acceptance if these could not be met at work (as well as at home). For those who work in an environment where they are ridiculed and degraded or even simply not recognized and rewarded, or where their voice is silenced, it would be hard to imagine that they would have much esteem or feel much acceptance. These individuals would not be meeting the needs they have as human

⁷³ See JONES & GEORGE, *supra* note 33, Ch. 9, at 329–332.

⁷⁴ HERTZ, Ch. 4, at 57.

⁷⁵ DONNELLY, *supra* note 53, at 28.

beings. Such a work setting is clearly an affront to human dignity, and a violation of the very definition of human rights. The importance of working conditions to human rights is recognized in many international conventions, treaties, and organizations, including the Universal Declaration of Human Rights (UDHR), the International Labor Organization (ILO), The International Covenant on Economic, Social, and Cultural Rights, etc. Workers do not become any less human when they “clock-in” to their work. Therefore, people have the same human needs and rights when they are working as when they are outside of their employment. The opportunity to meet these higher level needs is also a human right; these needs must be met in order protect the right to dignity; and these rights must at least in part come through the institution of work that places such a large role in human existence.

The recognition of these higher level needs as rights is included in the text of the UDHR.

Article 23 (1): Everyone has the right to work, to free choice of employment, **to just and favourable conditions of work** and to protection against unemployment.⁷⁶

These just and favorable working conditions are necessary to allow for growth, esteem, voice, and recognition in the workplace.

Articles 7 and 12 of the U.N. International Covenant on Economic, Social and Cultural Rights further support this argument for a right to these higher-level needs.

Article 7

The state parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(b) safe and healthy working conditions

⁷⁶ UDHR, *supra* note 54.

Article 12

1. The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.⁷⁷

While Article 7 supports the human right to a safe and healthy working environment, when this is read together with Article 12, this suggests that mental and physical safety and health are equally important. Psychological well-being would be damaged in a degrading, intimidating, controlling environment where an employee's voice is squelched, esteem is damaged, and growth is inhibited. Finally, again revisiting the Declaration of Independence, inalienable rights go beyond merely the rights necessary to survive to include the rights necessary to the "pursuit of happiness." Simply meeting basic human needs necessary for physical survival clearly does not afford one the ability to pursue happiness. Instead, there must be some level of protection of higher-level human needs to allow for the pursuit of "happiness."

When human rights are violated inside or outside of the workplace, the decision is made that some should live as less than humans. If higher-level needs are violated in the workplace, then the human right to dignity is violated at work. Further, it is important to understand that when these rights are violated they are indeed violated by choice. It is indeed a choice one makes when one decides to not uphold these human rights. According to Donnelly, "The impediments to implementing most economic and social rights, however, are political. For example, there is more than enough food in the world to feed everyone; widespread hunger and malnutrition exist not because of a physical shortage of food but because of political decisions about distribution."⁷⁸ This potential conflict between economic gain and other human rights was so apparent and important to Plato that he wanted to abolish all property

⁷⁷ International Covenant on Economic, Social and Cultural Rights, G.A. Res 2200A (16 Dec. 1966).

⁷⁸ *Id.* at 29.

ownership in order to protect human rights.⁷⁹ Again, it is these human rights that should be afforded the highest precedence.

Therefore, each time public policies are analyzed, laws discussed, new legislation proposed, or the actions of corporations, employers, or any other controlling body are analyzed, an analysis on the impact on human rights should be conducted. In fact, this analysis should be the primary type of analysis. A number of international treaties, covenants, and declarations such as the United Nations Universal Declaration of Human Rights and the 180+ ILO conventions recognize these rights and the importance of these rights.

The laws of the United States most often lack any human rights focus and minimize the protections for workers. Instead, the US legal system is built around a protection of property rights and corporate interests. For example, since the passage of the Wagner Act in 1935, which established employee rights to bargain collectively, this law has been under continual attack. In 1938, the Supreme Court upheld the right of employers to permanently replace striking workers, thus minimizing the employee power of a strike.⁸⁰ In 1947, the Wagner Act was limited by the passage of the Taft-Hartley Act, which not only established unfair labor practices for unions, but also eliminated supervisors from coverage under the National Labor Relations Act (NLRA).⁸¹ The law has been so weakened that, despite the fact that 30 million workers would choose to be in a union but for employer intimidation,⁸² less than 9% of the private workforce is organized.⁸³ According to Michael D. Yates, “[s]ince the

⁷⁹ ISHAY, *supra* note 55, at 38.

⁸⁰ NLRB v. MacKay Radio, 304 U.S. 33 (1938).

⁸¹ Taft Hartley Act of 1947, LMRA; 29 U.S.C. §§ 141–197

⁸² Andrew S. Levin, *What 30 Million Workers Want—But Can’t Have*, 3 U. PA. J. LAB. & EMPL. L. 551 (Spring 2001).

⁸³ According to a study by the Labor Research Association, as of the year 2000, labor density in the private sector had fallen to 9% from a high of 35% in 1950. *See* <http://www.laborresearch.org/story.php?id=107>

mid 1970s, politicians of both parties have bent over backwards to implement what amounts to a full-scale assault on working people.”⁸⁴

Workers’ rights and human rights in the workplace have been ignored for far too long in the US legal system and in organizational research. For these reasons, I answer the question of “critical in the name of what?” as follows. This dissertation is critical in the name of workers’ human rights, which are based on the foundation of human dignity and include a right to employment itself, a right to be treated with respect and esteem, and a right to the opportunity for growth, self-actualization, participation, and voice in one’s job. Further, these include a right to be free from any behaviors, policies, practices, or procedures that would strip an employee of any of these rights. As will be discussed later, workplace bullying violates every one of these human rights at work.

“Human rights evolve in reaction to new or newly recognized threat to human dignity.”⁸⁵ Based on the research discussed below, in conjunction with the conclusions of other researchers, I argue that workplace bullying is indeed such a newly recognized threat to human dignity. This is not to say that workplace bullying is the only action or phenomena that violates human rights in the workplace. Rather, I treat human rights as my dependent variable much in the same way as traditional organizational researchers treat profit as their dependent variable. For my research, the question is, what effect does workplace bullying have on workers’ human rights?

⁸⁴ MICHAEL D. YATES, *WHY UNIONS MATTER* (Monthly Review Press 1998).

⁸⁵ DONNELLY, *supra* note 53, at 222.

CHAPTER FIVE:

INSIGHT SECTION ONE: WHAT IS WORKPLACE BULLYING?

Having established the human rights foundation of this dissertation, the next step is a critical management studies analysis of bullying and its impact on employees' human right to dignity. According to Alvesson and Deetz, the first step of a CMS study is to gain insight.⁸⁶ Gaining insight to workplace bullying entails understanding what workplace bullying is, the effects of workplace bullying, and what has been done about workplace bullying. While further insight will be gained in exploring why workplace bullying occurs, this will be undertaken in the second part of this dissertation as part of the critique of the system that supports and allows for workplace bullying. Another way to explain this step of this dissertation is by using CSR or business ethics terminology. According to Carroll and Buchholtz, in answering a business ethics or CSR problem one must address four questions: What is? What should be? How do we get from what is to what should be? And what is our purpose in all of this? I would add that one must answer why things are the way they are. In this chapter of my dissertation, gaining insight is about discovering "what is." In other words, this chapter explores the actual experiences or perceptions of experiences of workplace bullying with a particular focus on employees' human rights at work. While I did not enter this research with specific theories, as described in Chapter Two, I do have some general hypotheses. The first of these hypotheses is that workplace bullying will take many different forms. Through the following qualitative research, I found a great deal of evidence to support this hypothesis. From this evidence, I was also able to develop a new definition of workplace bullying.

⁸⁶ ALVESSON & DEETZ, *supra* note 27, at 17–18.

What is Bullying?

Perhaps the most basic starting point to gain some insight is to turn to the dictionary definition of the topic. Merriam Webster's Dictionary defines the verb "bully" as: "to behave as a bully toward: DOMINEER, syn. Browbeat, intimidate." "Domineer" is further defined as "to rule in an arrogant manner, to be overbearing, intimidate as to make timid or fearful, to compel or deter by or as if by threat."⁸⁷ So bullying at least has something to do with controlling and intimidating. In fact, according to Namie and Namie, bullying is all about control.⁸⁸ All of these characteristics do, indeed, surface in the research participants' descriptions of their experiences with workplace bullying. So this simple dictionary definition of bullying to intimidate or domineer at work does explain much of what seems to happen with workplace bullying. However, when the literature, case law, and statutes are explored, and in my conversations with targets of workplace bullying, I have found there are many different nuances and unique characteristics of each experience that require an expanded definition of workplace bullying.

Defining Workplace Bullying

The purpose of this section is to develop a definition of workplace bullying from the perspective of targets of workplace bullying and the impact of these behaviors on their human right to dignity. While this insight section has its own purpose of simply gaining an understanding of employee perceptions of this form of mistreatment at work, the ultimate purpose is to achieve a method, path, or program to eliminate bullying from the workplace in order to better protect employee dignity at work. The hope is that by developing a definition and gaining greater understanding of

⁸⁷ MERRIAM-WEBSTER DICTIONARY, NEW EDITION, *supra* note 58.

⁸⁸ NAMIE & NAMIE, *supra* note 1, at 52.

what is happening at a micro level in regards to workplace bullying, I will be able to begin to develop measures that may be taken to eliminate workplace bullying behaviors. Through this understanding, I will also be able to explore the effect these behaviors have on worker dignity and to identify the specific behaviors that inhibit employees' rights to voice, esteem, participation, etc. This exploration is detailed in Chapter Six. The focus and the basis of the definition I have developed in this chapter are human dignity and, specifically, the dignity of the targets or victims of such actions. My hypothesis here is that there will be many different forms of bullying; that each instance, definition, and understanding of workplace bullying will be unique to each target; and that each of these experiences will affect the targets in unique ways.

There are several methods one could use to define workplace bullying. For instance, some definitions list specific acts that would be considered bullying. According to Randall, "people believe it is sufficient to list behaviors to define bullying."⁸⁹ Others, such as Zapf, list categories of behaviors rather than specific behaviors.⁹⁰ However, the problem with either of these types of definitions is that there are many different behaviors that may fit into a definition of workplace bullying, and by attempting to make a comprehensive list many behaviors that should be included may be left out. Further, the same behavior may or may not be bullying in certain circumstances such as setting, the time, etc. Past research has found that many research participants do not label certain acts as bullying that the researchers themselves would define as workplace bullying.⁹¹

A second method of defining workplace bullying may be to look at terms of similar behaviors that already exist in the workplace. For instance, it is conceivable to

⁸⁹ RANDALL, *supra* note 3, at 3.

⁹⁰ STALE EINARSEN, HELGE HOEL, DIETER ZAPF, & GARY L. COOPER, *BULLYING AND EMOTIONAL ABUSE IN THE WORKPLACE* 9 (Taylor & Francis 2003).

⁹¹ RAYNER ET AL., *supra* note 8, Ch. 7, at 125.

take the US legal term of workplace harassment and build from here to define bullying. While this method will be effective in describing the difference between bullying and the legal definition of harassment, it leaves open the possibility of ignoring other definitions that may already provide a better foundation.

While there may be no one right way to come to a definition of bullying, I have selected a third method. I have explored various definitions of workplace bullying and related terms, such as harassment, and the elements of each of these definitions and compared each element to the qualitative data gathered through written narratives, qualitative interviews, focus groups, and even participant observation. These initial definitions come from the policies, social research, and laws on bullying and harassment. In this chapter, I analyze each element that appears in these definitions from a human rights perspective and compare these definitions to the experiences shared by the research participants and my own experiences in the workplace. I explore whether each element excludes actions that are perceived to be workplace bullying or actions that violate employees' human rights. Those elements that exclude such actions or behaviors are not included in the final definition of workplace bullying. This analysis provides the foundation for a new, human-rights-based definition of workplace bullying and helps to gain insight into workplace bullying through the lens of human rights.

Purpose of the Definition: Legal Definition or Organizational Definition?

Before moving to the analysis of these definitions/elements of a definition of workplace bullying, it is important to understand the purpose of the definition I develop in this section. The purpose of my definition is not to provide employees with a method to sue employers to win a big windfall. Rather, the purpose is to eliminate bullying from the workplace. Some researchers suggest that there should be different

definitions for workplace bullying—one for organizational purposes and a different one for a legal standard. For example, Rayner suggests that “personnel managers” should have a lower threshold definition of behavior that rises to the level of bullying than should a legal standard.⁹² Likewise, Einarsen agrees with Legnick-Hall that what is needed is to have an objective standard of bullying for legal purposes that might differ from a definition of workplace bullying that would be used for other purposes.⁹³ However, the problem with this stance is that it allows employers to set the definition of employees’ rights. The employer that chooses not to apply a lower threshold than this heightened legal standard of workplace bullying would be free to do so. Based on the prevalence of workplace bullying discussed later in this dissertation and the research respondents’ suggestions that their employers took no interest in eliminating the bullying in their workplaces, many employers would most likely choose not to be concerned with this lower threshold.

In order to further explore the possibility of two different definitions for workplace bullying, I engaged the first focus group in this discussion. Initially, participants in this focus group did feel that there should be a different legal standard that employers would be required to follow than the standard that they felt employers should follow. The participants felt that while there was a broad definition of workplace bullying that should not occur in the workplace and that employees should not have to endure, they felt that employers should only be legally liable for a narrower definition of workplace bullying. However, as the group discussed the difference between the views of unlawful harassment in the United States versus workplace bullying, the support for separate definitions waned. There was concern that bullying was not addressed by most employers because there was not a legal need

⁹² *Id.*

⁹³ Einarsen, *supra* note 5.

to address it, but that the effects of workplace bullying could be just as bad as those of the legally defined workplace harassment.

As the group progressed through the discussion of their experiences, we decided that we could develop a definition of workplace bullying, that employees had a right to be protected from this behavior in the workplace, and that unlawful harassment was really a subset of this definition. The participants in the focus group became concerned that if a heightened legal standard was developed that employers would end up setting their internal policies to this standard. All of the participants in this group felt that their employers' current policies regarding workplace harassment were only developed to deal with potential legal concerns and that the same would occur with a legal definition of workplace bullying. In the end, the group decided it would be best to develop a single definition. This definition of workplace bullying will be discussed in greater detail later in this dissertation.

Further, because the definition I am looking to develop in this dissertation is meant to protect employees' human rights, there is not the need to have a heightened legal standard. The legal definition of workplace bullying should also protect employees' human rights. Again, my purpose is the protection of the dignity of employees. Employees have a human right to dignity in the workplace and should have an enforceable right to demand this from their employers. If employees have a human right to dignity, then they should also have a legal right to dignity. Once behavior has crossed the line of violating one's human dignity and thus violating one's human rights, it has become bullying. Further, employers have also already set their threshold for workplace bullying. As one can see from the prior research of Namie and Namie, Coleman, etc., and as will be discussed below, employers have set this threshold in such a way that workplace bullying has become and continues to be a pervasive problem. According to the research participants, the bullying behaviors that

they experienced were often accepted by those in charge at their employers. These employers did not enforce and prohibit some lower threshold of workplace bullying. Instead, they tended to ignore or even support the bullying behaviors in the workplace.

The proposals for a separate definition of legal standards versus organizational standards seem to focus on a desire for an ‘objective’ standard for legal liability. However, the problem with this is too often courts are turning away from the trier of fact that is best able to determine if a reasonable person would have viewed the behavior as objectionable, severe, and pervasive, etc., and are substituting their own beliefs for the beliefs of the jury. As a result many harassment cases are thrown out at the summary judgment stage because a single judge has decided that the accused actions are not objectively severe and/or pervasive enough to have created a hostile working environment.⁹⁴ As a result the definition of unlawful harassment in many cases serves the employer’s interests while leaving victims with no recourse. My purpose in this research is to establish a definition of workplace bullying as a path to getting one step closer to protecting employees’ human rights in the workplace. The definition should serve to emancipate employees and to protect the rights of targets. Too much focus on an objective standard for legal purposes may lead to a definition that serves only the interests of employers, as occurs with workplace harassment. Instead of truly looking at bullying from a reasonable-person standard, this “objective” legal standard may be twisted by the views of a few privileged judges.

Another argument for a separate objective legal standard could be that it would be difficult to define bullying in the court room. The reality is that litigation is often how legal standards are defined. This is true of course in common law in defining

⁹⁴ According to David J. Walsh, nearly 50% of sexual harassment cases have been dismissed through summary judgment. Further, some of the cases will be reviewed later in this paper. DAVID J. WALSH, EMPLOYMENT LAW FOR HUMAN RESOURCE PRACTICE Ch. 1, at 3 (2nd ed. Thomson Southwestern 2007).

negligence, duties, breach of duty, etc., but it is also true of statutes. In fact, in the discussion below of US harassment law, it is clear that courts played the major role in giving a definition to the term “harassment.” There is nothing specifically listed in the Civil Rights Act of 1964 that makes harassment unlawful, much less that defines workplace harassment. Instead, the US Supreme Court in *Meritor Savings Bank v. Vinson* first determined that sexual harassment was a form of discrimination.⁹⁵ There is no reason to believe that a legal definition of workplace bullying could not be developed in a similar fashion. For these reasons, this first section of this paper will be focused on developing a definition of workplace bullying to be applied in all situations legal, practical, etc. Should such a definition need clarification in order to fit within the American system of jurisprudence, then this would be done through civil litigation.

Current Definitions of Workplace Bullying

There are many different definitions of workplace bullying. While Randall explains that an “agreed definition of bullying do[es] not exist,”⁹⁶ according to Farrington, “there is widespread agreement that bullying includes several key elements: physical, verbal or psychological attack or intimidation that is intended to cause fear, distress or harm to the victim; an imbalance of power . . . absence of provocation . . . repeated incidents.”⁹⁷ However, even these elements have much that can be debated.

From a research standpoint, workplace bullying is typically defined in two ways. The first method entails presenting research participants with a definition of bullying and asks whether the research participant has been bullied. This method has been used by Hoel, Cooper, Einarsen, and Skogstad, and others and is generally

⁹⁵ *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

⁹⁶ RANDALL, *supra* note 3, Ch 1, at 3.

⁹⁷ Farrington, *supra* note 4, at 384.

defined as the self-report method. A second method entails providing research participants with a list of behaviors and asking them if they have experienced each of these behaviors, how often, and in some cases for how long. This method is often defined as the operational method. The operational method most often yields a much higher incident rate of workplace bullying than the self-report method.

For instance, Hoel and Cooper utilized a modified NAQ as well as the self-report method. In this case, they found that less than half of those who stated that they experienced the negative behaviors listed in the NAQ labeled themselves as targets of bullying.⁹⁸ Likewise, in 2001, Mikkelsen and Einarsen specifically undertook to study whether reports of bullying would vary under these two methods. They found that while 2–4% of employees self-reported bullying, 8–25% were classified as targets under the NAQ instrument.⁹⁹ Agervold and Mikkelsen found an even larger variance, with only 1.6% self-reporting and 13% defined as targets under the operational method.¹⁰⁰

While various reasons have been proposed to explain over-reporting in the operational method, perhaps the real problem is that the agreed-upon definitions of workplace bullying are simply too narrow. The research question for the first piece of this study is whether there is an adequate, comprehensive definition of workplace bullying that will encompass all of the expectations of employees and cover all of the forms of this abuse in the workplace—a definition that will protect employees' right to dignity at work.

I will begin this exploration by studying some of the consensus elements of definitions of workplace bullying as well as pieces of the definition of hostile

⁹⁸ RAYNER ET AL., *supra* note 8, at 41 (citing Hoel & Cooper).

⁹⁹ Eva Gemzoe Mikkelsen & Stale Einarsen, *Bullying in Danish Work-Life: Prevalence and Health Correlates*, 10 EUROPEAN JOURNAL OF WORK AND ORGANIZATIONAL PSYCHOLOGY 393 (2001).

¹⁰⁰ Moens Agervold & Eva Gemzoe Mikkelsen, *Relationships Between Bullying, Psychosocial Work Environment and Individual Stress Reactions*, 18 WORK & STRESS 336–351 (2004).

environment workplace harassment under the US employment laws. This analysis includes a review of prior works, engages some legal analysis, and explores the written narrative, qualitative interview, and focus group responses of self-selected research participants in my study. These qualitative approaches will allow for deeper, richer responses to the question of what workplace bullying is and will also allow for micro-level, local insight into the perceptions of just what targets mean by workplace bullying. This deeper, richer insight also leads to some explanation as to why research participants differ on whether or not they consider certain actions to constitute workplace bullying. Finally, it will also allow for a deeper exploration to the question of “why?” “Why” certain actions are bullying, “why” certain elements should or should not be part of the definition, etc. The answer to these questions is difficult to ascertain in any study, but is perhaps most difficult if not impossible through the use of survey material.

Analyzing the Elements of Current Definitions and Exploring the Content of Research Participants’ Experiences

Repeated incidents versus one incident

Many researchers of workplace bullying focus only on repeated, recurring acts in determining whether actions constitute workplace bullying. This is perhaps the biggest error in the debate on defining bullying. Randall states that “[t]he main similarity between the definitions [of bullying] is the implication that bullying is likely to be repeated or systemic . . .”¹⁰¹ but that “aggressive behavior does not have to be regular or repeated for it to be bullying behavior.”¹⁰² Namie and Namie define bullying as the “repeated, malicious verbal mistreatment of a Target. . . .”¹⁰³ According to

¹⁰¹ RANDALL, *supra* note 3, Ch. 1, at 4.

¹⁰² *Id.* at 5.

¹⁰³ NAMIE & NAMIE, *supra* note 1, at 3.

Einarsen, “bullying is not normally about a single and isolated event.”¹⁰⁴ Both the Quebec law prohibiting psychological harassment at work and the Swedish Victimization at Work Ordinance include repetitive nature as part of the definition of prohibited acts.¹⁰⁵ However, it is important to note here that Randall and Einarsen, as well as the laws in Quebec and Sweden, all leave the door open for a single incident being considered workplace bullying. In fact, Einarsen states that there are many cases where single episodes of bullying are “experienced as a critical life event,” such as when the victim is “physically threatened, threatened with dismissal, or if someone’s career prospects are destroyed.”¹⁰⁶ Further, the ILO defines workplace bullying as:

Workplace bullying is one of the fastest-growing forms of workplace violence. It constitutes offensive behaviour through vindictive, cruel, malicious or humiliating attempts to undermine an individual or groups of employees through such activities as making life difficult for those who have the potential to do the bully’s job better, shouting at staff to get things done, insisting that the “bully’s way is the right way,” refusing to delegate because the bully feels no one else can be trusted, and punishing others by constant criticism or removing their responsibilities for being too competent.¹⁰⁷

It seems clear that bullying can indeed be a single incident. It may be unfortunate that so many researchers and legal definitions of bullying focus on the repetitive nature of most bullying at the expense of single incidents that may be just as damaging to one’s person or dignity. Because my definition is focused on the effect on one’s dignity, I am unconcerned as to whether the bullying takes place repeatedly over time or is a single act or behavior. Instead, I am concerned with whether the target’s

¹⁰⁴ Einarsen, *supra* note 5, at 7.

¹⁰⁵ Quebec Provincial Law, Labour Standards, § 81.18 Psychological Harassment at Work; “Psychological harassment is vexatious behavior . . . They are repetitive (however it is important to note that under this law, a footnote states—“A single serious incidence of such behavior may also constitute psychological harassment if it undermines the person’s psychological or physical integrity and if it has a lasting harmful effect.; Sweden’s 1993 Victimization at Work Ordinance—1. Definition . . . recurrent, reprehensible, or distinctly negative actions . . .

¹⁰⁶ Einarsen, *supra* note 5, at 7.

¹⁰⁷ Vittorio Di Martino, *ILO Safe-work: Violence at the Workplace: The Global Challenge* (2000), at <http://www.ilo.org/public/english/protection/safework/violence/violwk/violwk.htm>.

rights are violated. These rights can be violated by a single incident, a series of behaviors, a pattern of behavior, or a pattern of escalating behavior. While the pervasiveness of the incidents may indeed make them more likely to damage the target's psyche, morale, and dignity, making a determination as to whether the incidents have been systemic or even repeated will not be relevant to the human-rights-based definition of workplace bullying.

Written narrative responses by my research participants, the qualitative interview responses, and the focus group discussions all revealed participants' views that bullying could indeed be a repetitive, recurrent series of events or could be a one-time event. When respondents were simply asked to define workplace bullying in a written narrative format, the definitions referred to repetitive acts and single incidents. One written narrative participant labeled bullying as "any attempt," another as "any incident." However, other respondents were more focused on the repetitive nature of bullying—"persistent, offensive . . . behavior," "if this is done continuously . . ." So while it seems clear that bullying may be repetitive in many instances, even a single isolated act may indeed constitute bullying and should not be eliminated from inclusion within the definition of workplace bullying. Perhaps an appropriate stance is to balance the element of pervasiveness with the severity of the action. In other words, what may seem like a fairly benign action if done continuously may indeed become bullying (low severity, high pervasiveness), while on the other hand a very serious event, even if it occurred only once, can be equally as damaging (high severity, low pervasiveness).

While the majority of the research participants shared ongoing patterns of workplace abuse in their stories, there were also clear indications that each of these incidents, even taken alone, had an impact on their dignity, were humiliating, or caused damage to their self-esteem, belongingness, or growth. For instance, one

participant during the in-depth interview shared an incident that occurred when she called in for a day off from her normal schedule. She had been employed with a local branch of a national chain of hotels since the day this specific hotel opened (approximately 18 months). She had never called off this entire time, while she knew of many other employees who had called off. She called off for one day of work to attend her friend's wedding. Upon her return to work, she found a SUSPENDED FOR TWO WEEKS notation next to her name on the schedule. This schedule was accessed by all employees of the hotel, and in fact, most of this individual's co-workers knew of her suspension prior to her. She was the first person ever suspended at this hotel. In her words, she felt "humiliated." Many of her co-workers told her that they would never have returned to work if that had happened to them. She described this incident as part of a pattern of "mistreatment" directed toward her by the assistant manager, but she also stated that this incident alone did indeed make her feel humiliated. There was no need for the incident to be repeated in order for this to have been perceived as bullying.

For another research participant, a single encounter with a manager from another department was enough to amount to workplace bullying. In this case, the research participant asked to borrow a file from this other department. The manager proceeded to "flip out," yelling at this individual. She continued to walk out of the department with the file, yelling at the research participant as she walked. She continued past co-workers, customers, and the general public, all the while yelling at this other individual. This research participant said she had never felt so angry and humiliated—stating that not even a schoolyard bully had ever made her feel that way. Again, this single incident was severe enough to rise to the level of workplace bullying from this target's perception.

Another research participant shared an experience of being forced to work on accreditation requirements for a small college. He tried to explain to the assistant provost that he needed more information to complete the work. His concerns were simply brushed aside by the college administration, and he was told to do the work. While this seemed to have become standard operating procedure at this institution, for this individual this single act was enough that he considered it to be workplace bullying. He stated that it made him feel like he was not respected.

Of course this is not to suggest that workplace bullying may never be a repetitive or ongoing phenomenon. In fact, the hotel worker described above, as well as the faculty member who worked on the accreditation process, also explained that they experienced ongoing long-lasting workplace bullying in different forms or from other bullies at their places of work. The university administrator who experienced the tirade described above likewise described a culture of bullying and intimidation at her workplace. An optometrist's office manager who participated in the interview process experienced randomly occurring bullying from her boss for 10 years. A financial services intern explained how the client service associate at his office bullied him and the financial planners on a regular basis. The physical therapist stated that she was regularly bullied by one individual who just did not seem to like her.

As a participant observer, I also saw and felt how workplace bullying could take the form of a single event. However, I do have to qualify that with the fact that I also observed and felt a culture of bullying, intimidation, and fear in this organization, where I felt single incidents were examples of workplace bullying. At this employer, as I became active in calling for a stronger employee voice to help end this culture of fear and intimidation, I myself became the target of workplace bullying. At least three separate times I felt bullied and intimidated by single events. At one time, I received a message, through my boss, that the president of the university no longer wanted me to

send any letters to the MBA students I was directing. This came in response to a letter I had sent explaining to the students the reasoning behind the cancellation of a number of courses during one semester. The letter did not protest the cancellation, but merely explained the reasons. I clearly felt that the message was to intimidate and strike fear in me regarding the security of my position. These actions were intimidating and belittling, even though by this point I viewed my employment with this university as a research exercise rather than as my long-term career.

On a second occasion, a few days after all faculty were asked to complete a faculty perception of the university president form, the faculty in my school, the school of business, received an e-mail from our dean. The e-mail stated that the perception form was a “witch hunt orchestrated by a vocal minority of faculty members that did not represent the interests of all faculty members.” Further, we were told to write in the comments section that we did not agree with the use of the evaluation. Again, the message seemed to be “comply or else” and that our own independently formed opinions of the university president were irrelevant. This to me seemed to be an attack on any type of dissent and an attempt to limit the faculty voice at this institution.

Finally, toward the end of my tenure at this employer, the newly appointed dean of the school, whom I had supported during his tenure as interim dean and application for the full-time dean position, informed me that in order to take the position of dean, the president required him to remove me as director of the MBA program. Considering the fact that I had limited contact, at best, with the president, this surprised me. The dean told me that this decision had to do with my complaining that resources had been taken away from the MBA program, my friendship with the local AFT president, and my involvement in the union at this university, the fact that I attended one board of governors meeting, and the fact that one student had complained

about the lack of courses offered in the MBA program. The message was clear, and when I asked the dean directly during this meeting, he confirmed it. He agreed that the president was clear, we were not to be involved in the union; in fact, the dean stated that the environment at the university was such that the union president (another faculty member) needed to be careful about who sat next to her. I also asked if we were not allowed to attend BOG meetings and the dean replied that we were not to voice our opinions or attend the open board of governors' meetings, nor were students allowed to voice a complaint to the administration about the administration. Clearly this single incident was intimidating and controlling. Fear was used as a tool not only to control me but also to control other faculty who might become involved in the AFT or might decide to complain about any perceived injustice. In the case of each of these three incidents, I definitely felt intimidated and bullied. I felt that my right to esteem and voice at work had been violated, and I felt rather powerless.

I also witnessed a number of single incidents that seemed to be bullying. In one case a colleague of mine with a tremendous accounting and financial background was on the budget committee for the university. When he voiced concerns about the way the budget was being handled and reported, he was quickly excluded from future meetings and eventually was entirely removed from the committee. To me this seemed an attempt not only to control this single faculty member but also to control future dissenters. I was also told of an incident at the faculty senate when the senate proposed an evaluation of the president. The president replied that if the evaluation was negative he would sue the faculty. While most faculty members I spoke with about this incident told me that they understood how hollow this threat was, for some this could have been very intimidating. Finally, when an entire committee on faculty evaluation continued to disagree with the school administration concerning the form of the new system that was being implemented to evaluate faculty, this committee was

completely disbanded. I spoke with a junior non-tenured faculty member about this committee, and it was clear the experience had been demeaning to her and that she felt intimidated.

As the goal of this section of my dissertation is gaining insight, two things may be taken from these research participants. First, workplace bullying can indeed occur as a single event in addition to ongoing patterns of events, and both forms of bullying have devastating effects for the targets and their organizations. For the research participant working in the hotel chain, many of her co-workers felt this one incident of bullying in the workplace was so severe that they would have left the job. Likewise, the administrator at the university described the single event as one of the most shocking experiences of her life and her career. These single events can also take many different forms—from the public berating and screaming experienced by the administrator to the use of committee assignments at the university.

While incidents of workplace bullying may be repetitive and ongoing, others may occur only once or last for a brief time. Both the ongoing and the one-time events may have serious effects on the targets. Both may indeed violate employee's rights to voice, participation, esteem, and dignity in the workplace. It is important that any definition of workplace bullying accommodates both repetitive events as well as single events. Second, these single events do not necessarily have to take on a dramatic form to amount to workplace bullying. The misuse of power, the misuse of policy, the ignoring of employee concerns may be enough to amount to workplace bullying. While the determination of whether workplace bullying has occurred, even from the subjective perspective of the target, will most likely be influenced by the repetitive nature of the event or events and the severity of such events, to require that the events be repetitive to be defined as bullying would be too limiting.

Type of attack/severity of the attack

Having answered the question of the required pervasiveness of the behaviors, this naturally leads to the question of how severe these behaviors must be in order to be workplace bullying. In terms of defining sexual harassment, the Supreme Court has been clear that unlawful harassment is more than “workplace incivility.” However, my goal is to define conduct that deprives employees of their dignity at work. In defining bullying, I seek to avoid a definition that is too narrow or restrictive to cover and account for the acts that are truly depriving employees of their right to dignity in the workplace. This is particularly the case in terms of defining the level of severity required to rise to workplace bullying.

In many studies the definition used to define bullying is too restrictive. For instance, Tracy and colleagues exclude from the definition of bullying low-grade incivility.¹⁰⁸ However, if this low-grade incivility has the effect of violating employee rights to dignity at work then this low-grade incivility should also fit within the definition of workplace bullying. As Lilia M. Cortina suggests, workplace incivility leads to lower job satisfaction, lower creativity, greater stress, and even higher levels of substance use. In this case, workplace incivility is described as “low intensity deviant behavior with ambiguous intent to harm the target, in violation of workplace norms for mutual respect. Uncivil behaviors are characteristically rude and discourteous, displaying a lack of regard for others.”¹⁰⁹ While many courts in the US suggest that an objectively harassing workplace must be proven to be a “hellish” environment, in reality much less severe actions can strip employees of their dignity and should be a matter of concern.

¹⁰⁸ Sarah J. Tracy et al., *Nightmares, Demons and Slaves: Exploring the Painful Metaphors of Workplace Bullying*, 20 MANAGEMENT COMMUNICATIONS QUARTERLY (November 2006), at 149–185.

¹⁰⁹ Lilia Cortina, *Unseen Injustice: Incivility as Modern Discrimination in Organizations*, 33 ACADEMY OF MANAGEMENT REVIEW (January 2008), at 56.

It would seem that low-grade incivility could indeed create a hostile working environment, and could indeed strip employees of their dignity. In fact, by making a bright line that low-grade incivility is not bullying, a determination must be made on a case-by-case basis of what behavior crosses the line into bullying. However, by focusing the definition around the outcomes of these behaviors, this problem is eliminated.

Further, the example of low-grade incivility perhaps gives us our best example of why we do not want to be quick to eliminate any specific behaviors from the definition of workplace bullying. If we turn to schoolyard bullying to help us to define bullying, we see that what would perhaps fit into the definition of low-grade incivility—“low intensity deviant behaviors with ambiguous intent to harm the target, in violation of workplace norms for mutual respect”¹¹⁰—can indeed also fit into any reasonable definition of bullying. According to Rachel Simmons, due to societal and cultural reasons, “girls use backbiting, exclusion, rumors, name-calling, and manipulation to inflict psychological pain,” rather than the prototypical schoolyard style of bullying of boys.¹¹¹ These behaviors by girls would be more likely to fit under workplace incivility than the typical definition of bullying. However, according to Simmons this typical “incivility” many girls suffer at the hands of their “friends” from school has lifelong negative effects at work and home for the targets, including a lack of confidence, anxiety, and a fear of messing up.¹¹² These same types of “chronic, low-key stressors can ‘wear down’ an individual, both psychologically and physically” whether they take place at home, at school, or at work.¹¹³ Further, Cortina

¹¹⁰ *Id.*

¹¹¹ RACHEL SIMMONS, *ODD GIRL OUT: THE HIDDEN CULTURE OF AGGRESSION IN GIRLS* Introduction 3 (Harcourt, Inc. 2002).

¹¹² *Id.* at Conclusion, 261–265.

¹¹³ Cortina, *supra* note 109, quoting from Wheaton 1997, at 57.

hypothesizes that workplace incivility may indeed be a new form of covert discrimination in the workplace.¹¹⁴

According to Rayner and colleagues, approximately one-half of survey respondents who identify themselves as targets of various forms of mistreatment in the workplace do not view themselves as targets of bullying.¹¹⁵ The studies still lack any conclusions or even findings as to why respondents do not identify these forms of mistreatment as bullying. The narrative definitions of workplace bullying and the responses during my in-depth interviews and other qualitative research provide further support that workplace bullying includes actions that may not amount to the level of severity as required under the current legal definitions of sexual harassment. Many of the behaviors described as bullying or mistreatment by the research participants also could fit into the definition of workplace incivility.

The university administrator said that her colleagues ignored her and left her out of training sessions, much like the school bullies described by Rachel Simmons. One research participant worked as a waitress at a local restaurant while going to school full-time. At this place of employment, the waitress was required to be what the owner defined as “Poky-Perfect.” This meant her hair, her attire, her jewelry, her shoes, and her make-up all had to live up to the owner’s expectation. If she was not found to be “Poky-Perfect” on any given day, whether at the beginning, middle, or end of her shift, her boss might ignore her or compliment others, intentionally leaving her out of any recognition.

For a university faculty member, the failure to recognize work that he had accomplished, or the failure to show appreciation when he had been forced to do additional work beyond the scope of his duties, was a definite source of unhappiness at

¹¹⁴ *Id.*

¹¹⁵ RAYNER ET AL., *supra* note 8, Ch. 2, at 41.

work that eventually led to an early retirement. Another professional staff member at the university described how continued incivility, such as her supervisor ignoring the staff member's attempts to say good morning or good-bye, led to a hostile environment. While other actions also contributed to the bullying working environment, this incivility from the participant's supervisor was enough to make her working life miserable and to affect her at work and even at home.

Even in my own experiences, many of the intimidating behaviors became difficult to describe or explain, and most likely none of these individually would be described as severe. For instance, the refusal to respond to issues or concerns, the refusal to allow courses to be offered, the use of committee assignments to stymie debate all seemed to be tactics used as a form of abusive control. However, to an outsider many of these behaviors may just seem like normal operation or, at worst, petty slight. Even from the inside it is difficult to describe the severity of these behaviors, but when they are taken as a whole, the effects were very intimidating and controlling and also demeaning.

While all of these examples may indeed be defined as incivility at work, and an outsider might hesitate to include these as workplace bullying, the reality is the effects of these behaviors could be very severe. Further, these behaviors were unnecessary and had no place at work. Finally, even if one is concerned that there not be a large financial settlement for someone who has had to endure these types of behaviors, the point again is not to provide potential financial windfalls; the goal is to protect worker's right to work and their right to dignity on the job by eliminating these types of behaviors. Therefore, there is no reason to exclude incivility from the definition of workplace bullying.

These low-level forms of bullying described by the research participants again support the argument that the pervasiveness of the bullying behaviors should be

weighed against the severity of these behaviors. In the discussions with the participants, none of them pointed to any single low-grade incident as bullying. Instead, the participants perceived these behaviors as rising to the level of bullying as they became persistent. For the university administrator, her supervisor engaged in a pattern of ignoring her greetings each morning and her attempts to say good evening to the point that this research participant decided to no longer attempt to be polite. The university administrator's co-workers did not simply exclude her once; this was a pattern and perhaps even escalating pattern of behavior. The restaurant owner's derisive remarks occurred on a daily basis and were part of a regular pattern of abuse. In these cases, the pattern and persistence of these behaviors led to an insulting and degrading working environment.

While the bullying and incivility experienced was pervasive in these examples, it is important to note that the behaviors themselves did not always take the same form. For instance, the university administrator's co-workers would ignore her on one day, exclude her from training the next, and give her the least-preferred work assignment the next. These were still patterns of abuse, but the specific behavior was not repeated, and this might mask the pervasiveness of the abuse. Even as the need for severity is balanced with the level of pervasiveness, it is important to assure that the target is not required to show that the same acts are repeated. Based on these examples, it is clear that while bullying may indeed include a pattern of abuse, bullies may use a number of different behaviors within this pattern.

Necessity of intent

Whether or not intent of the perpetrator should be a required element in defining bullying is a hotly debated issue. As Einarsen has stated, it is usually

impossible to “verify the presence of intent.”¹¹⁶ The difficulty in determining the existence of intent may be one reason why, according to Randall, “many behavioral psychologists are . . . opposed to the infusion of intent in definitions of this sort.”¹¹⁷ Further, if preserving employees’ dignity is a concern, whether an action was intended to threaten, coerce, etc., is not nearly as relevant as the outcome of the behavior. Perhaps a better place for the discussion of intent would be in the remedy phase. For instance, if a perpetrator of an act had no intent to commit an act, then it may not make sense to hold them responsible in the same way as if they intended the act or intended the resultant harm. Consider the current example of Ambien consumers. As has been discussed recently in the news, some users of Ambien have reportedly been eating, driving, etc., during their sleep.¹¹⁸ While it would make little sense to hold these Ambien users accountable for their action, one would still want to eliminate these actions (especially the sleep driving). Further, if the Ambien patient injured someone while sleep driving, this victim would need to be compensated for their injury, by the party most able to prevent the injury. This same standard could hold for truly unintentional bullying. While punishing the bully who truly acted in an unintentional manner may do no good, one still wants to make sure the action has stopped. Further, the innocent victim who has suffered some loss should be compensated accordingly.

Again, turning to the research participants’ responses, intent was not a necessary factor in the participants’ perception that bullying occurred. While some of the written narratives did indeed include some indication of intent on the part of the bully, many others did not. These other narrative responses tended to focus on the actions, intended or not, or the outcomes of the actions. Where intent was mentioned,

¹¹⁶ Einarsen, *supra* note 5, at 12.

¹¹⁷ RANDALL, *supra* note 3, Ch. 1, at 5.

¹¹⁸ CBS News, *Ambien May Prompt Sleep-Eating: Drug’s Maker Concedes It’s Possible Side-Effect, Though Rare* (2006), at http://www.cbsnews.com/stories/2006/03/15/earlyshow/health/health_news/main1404632.shtml.

the most common theme was that different bullying tactics were used in order to gain or exert control—“exercise of power over another,” “any attempt to force another employee to do something . . . ,” “trying to control another,” and the “aggressor is using the power to influence, manipulate and modify the behavior of another.” For one respondent, a bully’s intent seems to be even more insidious than that of control. This respondent wrote that a bully is “someone who delights in sucking the joy out of going to work.”

For one of the interview research participants, intent may make the difference in whether she would consider an act bullying. This participant stated that she witnessed a supervisor call employees in for a 7 a.m. group meeting to discuss the employees’ attitudes. She stated that in the case of this supervisor, the action was merely ignorance and not bullying. In her opinion, the manager had no idea how to manage people, but in other circumstances, such as with a more experienced manager, this may have been bullying. Of course, whether the manager was brand new or had 30 years of experience, for the employees, the effects of this meeting would most likely be the same. This same participant said that another manager’s decision to conduct a “chair check” each morning at 7:50 a.m. (ten minutes before start time) was indeed bullying behavior. In this case, the manager was “experienced enough to know better.”

While this inexperienced manager may indeed be similar to the unknowing Ambien user, perhaps the actions of this “unknowing” supervisor are really much different than the Ambien users. The Ambien users had no idea of these potential side effects, and when they engaged in these actions they did not even realize they were awake. For this supervisor, he accepted the leadership position and perhaps has a duty to make sure he is prepared for the position. Further, he is fully aware of his behaviors whether or not he realizes these may be perceived as bullying behaviors.

For other research participants intent was not relevant in defining actions as bullying. For instance, the optometrist's office manager described her boss as just being mean. The optometrist would come into the office in the morning and sometimes huff and puff and slam doors. She would be belligerent to her employees, and they would often try to hide from her. The office manager clearly stated that this was an example of workplace bullying. However, at least in part she credited this to a lack of managerial skills that "exists with all optometrists." While there may have been some intent to harm involved, the office manager stated that all optometrists lack the people side of management, but she still considered it bullying.

The Poky-Perfect waitress and another food service worker from a rest home both experienced a sexually harassing environment while working at the same restaurant for a very short time. In this case, the environment was hostile enough that both quit, but in both cases, they stated that this sexually hostile environment was just the way the industry was. Neither of these research participants thought there was an intent to create a hostile environment, yet the environment in essence controlled these two separate workers to the extent of forcing them to quit. In this case, even though the targets themselves did not feel there was bullying, these inappropriate, unnecessary behaviors forced them to leave their employment.

In my own experiences with bullying the day after I was told I was being removed from the position of MBA director due to the president's concerns that I was affiliated with the AFT and that I was voicing concerns about the MBA program, I received an e-mail from the dean asking me to step down because my "management style was not conducive to the growth of the program." Since the program had year-to-year growth of over 100% during its first two years, the intent of the president and dean seemed clear to me. However, could they now argue that the intent was not to bully, but was simply to improve the MBA program? As the target it would be

impossible for me to prove their intent had the dean not specifically mentioned the concern with my AFT involvement during the meeting.

For other targets of bullying, the bully's intent may not be so clear and may not come into focus until the target is close to leaving the organization. For one participant, the intent of her bullies dawned on her as a method to hold her down, to make her feel she was not worthy and thus could go nowhere else. She described the intent as retention by "making you feel worthless." She stated that the bullying made her feel as if no other employer would possibly want to hire her. However, this was not immediately apparent to her and in fact she stated that the bullying had lowered her self-esteem to the point that she began to think she had no value as an employee. It was not until she spoke with a friend who asked her to do some consulting work that she realized that the culture of bullying was meant to destroy her esteem. Other participants left their organizations and still stated that they could not identify why they were targeted.

Even where the research participants mentioned intent as an element, the reality is that many of the research participants could not identify the intent of the bully. Intent was often assumed, but how it would be proven is difficult to determine. At least in one situation mentioned above, where a university administrator had been berated publicly by a co-worker, when the target reported the incident, the bully actually denied that the events occurred, much less that she intended to bully her co-worker. In these types of circumstances just proving that the behavior occurred may be a big enough hurdle for the target; to then prove intent might very well be impossible.

Although intent should not be an element of the definition of workplace bullying, intent should still play an important role in relation to workplace bullying. Intent becomes a factor in determining how to eliminate workplace bullying. If the supervisor conducting the seat check or the optometrist berating her employees truly

did not understand that they may have been bullying their employees or that they lacked leadership skills, then perhaps leadership training would address this issue. However, training would do little good if the supervisor intended to bully the targets and intended to damage the employee's dignity. In that case, the target would need to have clearer recourse. In either case, the bullying, whether intended or not, has a negative effect on the employee's esteem and well-being. Therefore, intent should not be a factor in defining bullying, but may be a mitigating or aggravating circumstance in finding that bullying occurred and in remedying the bullying.

Power differential

Einarsen et al. conclude that conflict that is between two parties of close to equal value cannot be considered bullying.¹¹⁹ While it makes sense that two individuals with a true equality of power are engaging in conflict rather than bullying, care must be taken to not define power too narrowly. There are many different sources of power. For instance, in organizational leadership studies, it is common to define sources of power as either personal or position power. As far back as 1959, French and Raven defined different bases of power ranging from reward, coercive, and legitimate power to referent and expert power.¹²⁰ Position power, or the power from one's rank, is easily identified, and according to various studies, a differential in position power does exist in the majority of workplace bullying incidents.¹²¹ However, bullies can

¹¹⁹ Einarsen, *supra* note 5.

¹²⁰ John R.P. French & Bertram Raven, *The Bases of Social Power*, as reprinted in JOHN L. PIERCE & JOHN W. NEWSTROM, *LEADERS AND THE LEADERSHIP PROCESS: READINGS, SELF-ASSESSMENTS AND APPLICATIONS* (4th ed. McGraw Hill, Irwin 2006). French and Raven identified the following sources of power: reward power, coercive power, legitimate power, referent power and expert power. Reward power is described as the ability to reward, coercive power as the power to punish. Legitimate power is the power that one has through his or her position in an organization and the view by others in the organization that he or she has a legitimate right to exercise such power. Referent power is described as the power one has through a feeling of oneness with his or her followers, and expert power is derived from one's knowledge or the perception of knowledge. Any of these sources may be used legitimately or may be abused.

¹²¹ Yamada (2004), *supra* note 2.

indeed have equal or even less position power than their targets. Less formal sources of power such as personal power also must be recognized within this element of power. Simply being able to take away another person's dignity is an example of the use of power. Einarsen and colleagues also note that this power source need not be a formal source of power.¹²² In order to capture all of the different incidents of workplace bullying, if power is a piece of the definition of bullying, the term "power" will have to be used in a very broad manner. Focusing only on the conflicts that take place between supervisors and subordinates or looking to supervisor/managerial behaviors will not eliminate all forms of workplace bullying.

Turning to my research participants, in many cases the bully was indeed in a position of power higher than that of their target. In some cases, the bully was the owner of the organization. This formal power position did create many obstacles in the minds of the targets. For instance, when asked if there was a way to remedy the workplace bullying, one target stated, "No, it was her [the bully's] business so she could do whatever she wanted." For another participant the owner/operator of a vision store was the bully, and again, the target stated that this gave the bully the right to do whatever the bully chose. Another research participant experienced bullying from a commanding officer in the military and felt that due to the chain of command in the military there was not much he could do other than to come up with ways to convince the bully to change his behavior. The university faculty member had been bullied by his dean and the associate provost. Another faculty member had been bullied by past and present university presidents. A staff member at the university had been bullied by her supervisor. Bullying from those in formal power positions was a very common theme of the research participants and in each instance created a perception by the

¹²² EINARSEN ET AL., *supra* note 90, at 10.

targets that the bullying was accepted by the organization and there was no internal recourse.

However, even with the small number of research participants in this case, there were several incidents where actual position power made no difference in the bullying. For instance, a kitchen worker was bullied by another worker from a different department in a very similar position to her own. However, this other worker was much older and more experienced than the target of her actions. The bully also relied on what she perceived to be a physical power difference and threatened physical harm to this research participant. In the workplace, some may not consider the potential for use of physical power over another, but instead would limit their definition of power to the typical formal supervisory type of power that provides the ability to make decisions that would directly impact tangible working conditions of the target. The threats by this co-worker violated this research participant's rights at work. By all measures this co-worker did not have any type of additional formal power at work, but relied on physical intimidation as her source of power.

Another research participant experienced two separate forms of bullying from bullies with equal or less position power than the target. A co-worker from another department with a position of equal organizational power berated her in public when she asked this co-worker for a file. The research participant in this case did indeed describe this bully as a schoolyard bully and stated she had never been bullied that badly even on the schoolyard. This same incident was described earlier in the discussion of single incidents of bullying. In this participant's second example of being bullied by a subordinate within her department, an administrative assistant took deceitful steps to make this individual's life difficult. She would often tell visitors that the research participant was not in her office when she was indeed in her office. She

would also go as far as stealing memos from the desk of this research participant as well as the desk of other co-workers.

A research participant who was a faculty member told me that he had been bullied by younger junior faculty. These faculty members, with the support of the administration, told senior experienced faculty how to teach and how to develop their courses. This would happen at faculty-wide meetings with junior faculty first sharing ideas, then would trickle down to department meetings with junior faculty setting the direction for course development during meetings, and for senior faculty who did not comply they would eventually have one-on-one meetings with these junior faculty, the purpose of which was to bring the senior faculty into compliance. The senior faculty members' experiences were not considered, and they were not afforded the opportunity to express their concerns at any time during this process. At this same university, a former dean told me that she felt a faculty member, who reported directly to her, had been allowed to bully her. She stated that the administration's lack of support for her decisions had led to and even supported this bullying by this faculty member.

Finally, an intern at a financial services company sought me out because he knew I was conducting interviews. He told me he felt obligated, because his experiences were such prototypical examples of bullying. He explained that the customer service associate (CSA) in his office was bullying him as well as bullying all of the financial advisors. Interestingly, in the formal structure of the office, the CSA really reported to the financial advisors and at one point had even attempted to move up to be a financial advisor. However, this research participant suggested the CSA was able to bully for two reasons. First, she was the only CSA in the office, so the financial advisors were very dependent upon her services. Second, the industry was highly regulated and the financial advisors operated in a constant fear of violating a

regulation. The CSA often used threats that an auditor could be coming any day to keep the financial advisors in line. Again, this is an example of a use of power outside of the formal hierarchy of an organization that was still a very effective enabler for this workplace bully. In fact, she was so effective at bullying that this intern decided that financial services would not be a part of his future career.

During the course of the first focus group, I asked the group to consider various definitions of bullying and to consider the various elements of bullying to see whether we could develop a consensus definition of bullying that covered all of their personal experiences. As the group settled on a definition of workplace bullying that included “the unwanted, unwelcome abuse of any source of power,” one participant was concerned that this would be interpreted as only formal sources of power. He pointed out that many of the incidents he had experienced did not occur to someone who had less formal authority than the bully.

The element of power should be a piece of the definition of workplace bullying; but power must be carefully defined. Again, I am in no way suggesting that this research shows that the majority or even a large portion of workplace bullying occurs by individuals with equal levels of formal power. However, my interest is not just in eliminating the majority of workplace bullying, it is my goal to develop a model to eliminate all forms of workplace bullying. Further, my hypothesis is that there will be many different forms of bullying. Based on the response from these research participants, it is clear that bullying does occur from those in formal positions of power, but also that bullies may rely on informal sources of power. All of the bullying that occurred to the above research participants should be eliminated, not just the supervisory-level workplace bullying.

The potential problems with “unwanted”

The EEOC defines unlawful harassment as “unwelcome conduct that is based on race, color, sex, religion, national origin, disability, and/or age. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.”¹²³ The Supreme Court in *Meritor* also made it clear that unwantedness is a key to defining unlawful harassment.¹²⁴ While it is clear that it would make little sense to make unlawful conduct that the target of such conduct has requested, the element of “unwelcomeness” in a definition of workplace bullying raises some issues for concern. For example, many professional athletes have stated they prefer to play for coaches that many of us from the outside would identify as bullies. Examples of these types of coaches abound, from Bill Cowher, to Bill Parcells, to Bobby Knight. Many of these bullying coaches are extremely successful at recruiting players to voluntarily join their teams. Clearly, it would make no sense to say that these behaviors (at least toward the players they motivate) are unacceptable. At the very least, they are acceptable because it is clear these behaviors are wanted, and there is a clear choice made to play for these coaches. However, one must also recognize pitfalls in defining “unwanted.”

First, it is important to recognize that these behaviors that may be wanted by the professional and college athletes who choose their venues to play are not automatically acceptable behaviors across the board. In other settings, such as youth and primary and secondary school leagues, these behaviors may very well be bullying. Even for other players on the team who are limited in their ability to move teams, these behaviors may not be wanted and may be unacceptable. So it is important to

¹²³ The U.S. Equal Employment Opportunity Commission, *Harassment* (2007), at <http://www.eeoc.gov/types/harassment.html>.

¹²⁴ *Meritor v. Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986).

recognize that behaviors that may be welcome, wanted, and even chosen by some targets may indeed be “unwelcome” bullying conduct for others.

Second, it is important to be careful in how a determination is made as to whether behavior is unwanted. In one case, the Western District Court of Arkansas found that behaviors were not unwanted because the plaintiff so easily testified about them.¹²⁵ In *Kouri v. Liberian Services, Inc.* the Eastern District Court of Virginia found that the behaviors were not unwanted because the target was not clear enough in her complaints to the harassing supervisor.¹²⁶ In *Gibson v. Potter*, the 5th Circuit suggests that because a target of potential sexual harassment “laughed off the comments” these may not have really been unwanted.¹²⁷

What is clear from prior bullying research is that targets of bullying will react in different ways. Targets may turn their anger inward in many ways.¹²⁸ As has already been discussed and will be explored further, many victims of workplace bullying simply do not report the incidents. As Kleiman has pointed out, even in the cases of sexual harassment, the majority of incidents go unreported.¹²⁹ These different reactions should not be used to determine if the behaviors were unwanted.

Targets may not report the bullying behavior for a number of reasons. For instance, some research participants claimed that the bullying they experienced was just a natural part of the restaurant business. Other research participants did not report because they felt they were being weak, and others due to a lack of confidence in the available remedial measures. All of the different reactions to workplace bullying will

¹²⁵ *Tindall v. Housing Auth. of the City of Fort Smith*, 762 F. Supp. 259, 55 FEP 22 (W.D. Ark. 1991).

¹²⁶ *Kouri v. Liberian Services*, 1991 U.S. Dist. LEXIS 4143, * (ED of Va, 1991).

¹²⁷ *Gibson v. Potter*, 2008 U.S. App. LEXIS 2111 (5th Cir. 2008).

¹²⁸ According to NAMIE & NAMIE, *supra* note 1, at 199, targets may take out their anger at home, or through overeating or overdrinking, etc. Targets may also feel shame and thus not report the bullying. However, in neither of these cases does this suggest in any way that the bullying is not unwanted.

¹²⁹ Lawrence S. Kleiman et al., *Sexual Harassment and the Law: Court Standards for Assessing Hostile Environment Claims*, 11 J. IND. EMPLOY. RTS. 53 (2003–2004).

be discussed further in Chapter Six. However, for now the evidence shows that how a target reacts to workplace bullying is not a sound basis for determining whether the workplace bullying was unwanted.

While it is clear that actions that are wanted should not be considered unlawful bullying, it is important to be careful about how “unwanted” is determined. If the target says the action was unwanted (at any point), then it is unwanted. A defendant could present a defense that the behavior was wanted, but by putting the burden on the plaintiff to prove the negative of “unwantedness” in the case of unlawful harassment, the courts have shown the risks of this requirement. There are still many other pieces of the definition and potential defenses to liability available to the bully and the employer; a jury attempting to get into the mind of a target to determine whether or not they “really did want” the bullying is not a proper avenue. In every case, the research participants said the conduct was unwanted. However, from the outside looking in, it would have been conceivable in many circumstances to believe the behaviors were not truly unwanted.

Clearly only attacks that are unwanted can fit into the definition of workplace bullying. However, it is imperative that the definition not be interpreted to require some heightened showing of “unwantedness” as many courts have required in proving unlawful harassment. There would need to be some type of statement within or explaining the definition of workplace bullying that different targets will react to workplace bullying in different ways and that a target’s reaction is not necessarily indicative of whether the behavior is wanted.

Individual/group behavior and/or organization practices

While bullies may come from various positions in organizations and rely on various sources of power, bullying may also take the form of organization bullying as

well as personal. While much research focuses on individuals or groups of individuals (i.e. mobs) as the bully, Einarsen also points out that organization practices can be the source of bullying. “Bullying can indeed include organizational practices and procedures perceived to be oppressive, demeaning, and humiliating are employed so frequently and persistently that many employees feel victimized by them.”¹³⁰ The fact that workplace bullying or victimization can also take the form of workplace policies is also recognized in the Swedish Ordinance Concerning Victimization at Work.¹³¹ Later in this paper I will look at findings concerning the cause of bullying. Many of these are indeed organizational factors. Further, policies themselves can be a form of aggression, or degrading treatment. When these policies are enforced by managers and/or supervisors it is difficult to say that the enforcer is the bully. Rather, the organizational factor would be the bully. Again, it makes no sense to limit the definition of bullying to only individual or group (mobbing) behaviors if the focus is on the outcomes rather than the specific behaviors. Instead, if an organizational policy has the effect of stripping the dignity from a worker(s) then steps should be taken to assure this policy is eliminated. Finally, limiting the definition of bullying to not include bullying via organizational bullying would prevent bullies from exploiting organizational policies to victimize their targets.

In the qualitative interviews, the narrative definitions, and my participant observation of workplace bullying, organizational bullying became a common theme. In one case, a restaurant owner instituted a requirement for all servers to be “Poky Perfect” in their attire and their hygiene. Those who were not would be singled out or left out. In one organization, leaving troublemakers off of committees or removing these troublemakers from committees was a bullying method of choice. Denial of

¹³⁰ EINARSEN ET AL., *supra* note 90, at 13.

¹³¹ See Chapter Nine.

leave was another example of “bullying” through policies. In fact, one participant readily identified the unfair application of organizational policies in the military as more abusive than the ranting and insults during boot camp. For the faculty member, assigning extra work became the route of bullying. This work often needed to be completed, and assigning it was just an organizational practice. In fact, in many cases this overloading of work assignments by the dean was due to the fact that she had been overloaded with assignments from the provost or president of the university. Specifically, this faculty member mentioned that the new president expected so much more out of the dean that her response was to put so much more on him. It became a case of a trickling down of bullying through workload.

For the professional staff member at the university, her supervisor decided to limit all non-work discussions during working hours. This policy was enforced even when there were no students around. Again, this could be interpreted as simply a workplace policy, but in this case it appeared at least to the target to be bullying via workplace policies. While the information gathered here may not present definitive evidence that organizational bullying is any more common than personal and prototypical forms of bullying, clearly these organizational forms of bullying do exist and can be damaging to the targets and the organizations. Therefore, any definition of bullying must include these types of practices.

At the same time, there were also numerous incidents of interpersonal bullying: the co-worker at the retirement home physically threatening the food services worker, the president of the U\university yelling at the faculty member, the university administrator publicly berating her fellow co-worker. Group bullying or mobbing was also a part of some of the research participants’ experiences. For instance, the university administrator described her entire department excluding her, the waitress described being ignored at work, and the university staff member

described an entire culture of bullying and meanness in her department. Even in this small group of participants there are examples of bullying in all different forms: individual, group, and organizational. Therefore, any definition of workplace bullying will need to be open to these various forms of workplace bullying.

Summary of the exploration of the agreed-upon elements

Having looked at the majority of “agreed upon” elements of the definition of workplace bullying, my research suggests that many of these elements should either not be a part of the definition or should be addressed further in the definition. First of all, there seems to be some thought that there should be different definitions for workplace bullying in organizations and in the law. Based on my research, I see no reason for this distinction. The purpose here is to eliminate workplace bullying, to bring dignity to the workplace. All employees should be afforded this dignity. If this standard is left to organizations to decide, then those employees whose employers choose to only follow the law are afforded no protection. This is not to say that employers should not be able to afford employees further rights and protections than what a law might provide, but there should be no tolerance for workplace bullying in organizations or by any legal standard.

Second, while bullying has traditionally been thought of as an escalating and ongoing event, there is no reason to limit the definition of this term by requiring that events be repetitive. While a definition might make sense that balances the severity and pervasiveness of attacks in deciding whether workplace bullying has occurred, in several cases out of only 16 interview participants it became clear that singular events could indeed be intimidating, controlling, and strip workers of their dignity. To eliminate these single events from the definition of workplace bullying would afford bullies an opportunity to intimidate all employees enough on one occasion to gain the

control they are looking for. Further, this would leave many targets of workplace bullying unprotected.

Like the requirement of showing that these acts are repetitive, the requirement of showing the bully's intent should also not be a part of the definition of workplace bullying. Intent is too difficult to determine to be a required element. There are many instances of targets of bullying having been stripped of their esteem or dignity at work, where they are unable to prove any intent on the part of the bully. These actions should also be prevented in the workplace. However, perhaps showing intent could be one of the optional ways to prove bullying has occurred. For instance, to again borrow language from the workplace harassment laws, perhaps workplace bullying has the intent or effect of stripping employees of their human right to dignity in the workplace.

Finally, two elements that should be included in the definition, but perhaps should be further explained in any definition, are those of unwantedness and power differential. First, in terms of unwantedness, my concern is that this standard becomes an "objective" standard or, more specifically, becomes a standard that a single judge determines whether he/she feels the behavior was truly unwanted. Further, my concern is that too much credence will be placed in the targets' reactions to workplace bullying in how unwantedness is determined. I suggest that steps must be taken to assure that a target's reaction is not the basis for determining whether he/she wanted to be subjected to these bullying behaviors. In terms of using power within the definition of bullying, it is clear that power should be a part of the definition of bullying. However, it should be footnoted that power can come from many different sources. Power may be formal, organizational position power, or it may come from personal sources, or even physical sources. Therefore, this element of the definition of bullying should be stated as the use of any source of power.

So, looking to the elements of the definition of workplace bullying from these narratives, in-depth interviews, and focus groups, I have developed a working definition of workplace bullying. **Workplace bullying is the unwanted abuse of any source of power that has the effect of or intent to intimidate, control, or otherwise strip a target of his/her right to esteem, growth, dignity, voice, or other human rights in the workplace.** During the first focus group we discussed various definitions of bullying, including legal definitions and definitions proposed by researchers. For various reasons, none of the definitions seemed inclusive enough to address the different experiences, other than this definition. While the generalizability of this definition should still be tested, this definition of workplace bullying is more inclusive than prior definitions and is inclusive enough to cover the experiences of these 16 research participants. This definition provides a starting point to further study workplace bullying, including investigating the gap between self-reports and operational method reports of workplace bullying, and establishing policies, procedures, and even laws to address and eliminate bullying from the workplace.

Further Insights into the Specific Behaviors of Bullies, and Exploration and Expansion of the Working Definition of Bullying

What are these behaviors?

Information from the research participants is helpful in analyzing what elements should or should not be included in the definition of workplace bullying and in developing a new definition of workplace bullying. This information also gives a picture of the specific behaviors behind this definition of workplace bullying. As a first step to this research I asked participants to fill out a short survey. One question on the survey was whether they had been bullied at work (and if so, how often). This simple, single-question technique is most often referred to as the self-report method.

Another question on the survey was whether participants had been mistreated at work and if so, how often, with choices including daily, weekly, now and then, and never. Survey participants were then given a list of potential forms of bullying at work and asked how often each of these occurred. The results varied widely.

Of the survey respondents, 28 out of 61 reported that they had been bullied at work at least now and then. However, 43 of 61 reported that they had been mistreated at work at least now and then. It would seem that for some reason workers perceive bullying as having a different meaning than mistreatment. In exploring this, one respondent answered that “mistreatment was a more general term that encompassed bullying, but bullying goes further, especially with the intimidation factor.”

Another participant differentiated these terms from each other partially based on the level of intimidation, but thought of bullying in terms of the schoolyard bully and physical intimidation and thought of mistreatment as the “little digs.” However, after discussing many of the little digs she experienced at work, she decided that these were indeed types of bullying. When this same research participant came back for a second interview, she had further expanded her definition of bullying to include exploitation by businesses and the government of low-wage workers and those living in poverty. During our conversations, this research participant brought up the point that “‘we’ do not have a good idea of what bullying is, and that we really need to expand our definition and mindset about bullying at work and at school.” Her focus had gone from the behaviors of the bully to the outcomes to the targets. In her own experiences she had thought of how she had felt as she experienced the mistreatment she described at work, and she began to empathize with how other workers must feel. This suggests that even for the targets of workplace bullying, there may need to be a reflection period to decide whether or not something is indeed bullying at work. Further, it suggests that if the purpose is to protect workers’ rights to dignity in the

workplace, a definition of workplace bullying will most likely need to start from the outcome side rather than the behavior side.

Another participant, a faculty member at a mid-sized university, stated that mistreatment and bullying had the same meaning to him. It may be important to note that for this participant the bullying he experienced never seemed to intimidate him. He did say that at times he felt controlled, but in all cases he aggressively fought back against his bully. Another faculty member at the same university stated the difference might have something to do with the level of intent and also the level of compliance that was required. He stated that bullying is when they tell you “you will do something and you cannot ask any questions,” while mistreatment in his experience was more of a lack of respect for his position and putting work on him that someone else should be doing. However, in the course of our conversation, as he discussed the outcomes of these behaviors, he decided that both of these could indeed be forms of bullying. This, as well as the intimidation factor mentioned by the former telemarketer and the controlling behavior defined by the university professor, all suggest that the targets’ perceptions of being controlled or forced to do something or perhaps to refrain from something is an important piece of the definition.

For another research participant, intent was the difference between bullying and mistreatment. She saw her employer’s Poky-Perfect policy and the way this was applied as having intent to harm. At the same time, she stated she was ignored or excluded at work on a monthly basis, but she felt this was not bullying because the intent did not exist. Rather, she labeled this mistreatment. Finally, another research participant, the other food service worker, focused on the target in differentiating the terms. She felt that in order for workplace bullying to occur, the target would have to feel threatened.

While only 28 out of 61 survey respondents reporting being bullied at work, and 43 out of 61 reported being mistreated at work, 58 out 61 responded that they experienced at least one of the negative behaviors listed at least now and then. As in prior research there is clearly a gap between the self-report method and the operational method. However, some of this gap is filled when the term “mistreatment” is used in place of “workplace bullying.” There was also no clear theme as to which specific behaviors led to a self-report of bullying. However, there were some clear themes of what the working environment entailed for the survey respondents. Thirty-eight out of 61 respondents claimed to have been ordered to do work below their level of competence, 33 were given repeated reminders of their mistakes, 36 given tasks outside of their jobs, 31 were given an unmanageable workload, 26 were targeted with excessive monitoring of their work, and 28 had meaningful job tasks replaced with trivial tasks. All of these point to a clear lack of voice for these employees in determining their level of work. For these respondents, their work was clearly excessively controlled by a manager or supervisor.

This theme of control and a lack of voice also came up regularly as part of the in-depth interviews. The faculty members both felt that the lack of voice and the controlling nature of the university presidents and/or deans was a form of bullying. In fact, one of the faculty members described this squelching of employee voice as the goal of the bullying. Both university administrators talked about not being able to perform the parts of their jobs they enjoyed because they were given meaningless tasks and little say in the direction of their departments. The former soldier’s voice was squelched through the use of leave policies, and the office manager at the optometrist’s office felt her bullying boss did not delegate well. In all of these professional positions, voice at work is a huge issue. The silencing of this voice seems to either be a very common form of bullying, or the goal of other forms of bullying.

Aside from the actions by the optometrist and the one university president, this form of bullying most often was handled through less overt behaviors. It took place in the university through the elimination of committee assignments, the assigning of additional work, the implementation of policies with little or no discussion, by not providing opportunity for training, or even by simply ignoring the attempts at voice. These same covert methods seemed to be used by the commanding officer of the former soldier.

This theme of control existed across all of the different types of jobs, workplaces, and bullies. In the restaurant, the owner wanted to exert complete control over the wait staff in terms of their dress, grooming, demeanor, make-up, etc. to create what she deemed the “Poky-Perfect” waiter or wait staff. The bully who used physical intimidation was trying to control the food service co-worker, and, according to the research participant, this bully even stated that she would “tell her how to do her job.”

In my own personal experiences and observations, bullying was indeed about control. This control was exerted through the president’s message to stop communications with the students in my program, the removal of my co-workers from committees, and taking away my director position. However, the method of control can clearly vary from bully to bully. For the waitress it was through a dress code, for the food service worker it was through physical intimidation, and at the university it was through the application of policy, work assignments, and demotions. What is clear is that bullying results in the opposite of emancipation.

Around 50% of the survey respondents also reported that they had information withheld from them at work, they had gossip spread about them at work, had been ignored at work, and had even been shouted at now and then, and just under half of the female respondents had been the targets of unwanted sexual attention. This form of bullying seems to fall into a more personal method of bullying. While this theme of

personal-level bullying was less common in the in-depth interviews, it still arose, and it arose in all different settings. The university administrators both had experience with this type of bullying. One was ignored by all of her co-workers, was publicly yelled at and berated by a co-worker, and had information withheld by a direct report that negatively affected her work performance. The other felt physically intimidated during staff meetings, and had been ignored on many occasions by her supervisor. She was also the target of sexual harassment. For the office manager, it was common for her supervisor to yell at her and her co-workers. Finally, both of the food service workers described experiences with a working environment wrought with sexual harassment.

This research also bears out that not only does bullying take different forms, but the bullies also take different forms. This can be no more apparent than in the comparison of the two bullying university presidents described by the faculty member. One bully was very confrontational, even to the point of screaming at people in the hall and slamming doors. The optometrist, the university administrator's co-worker, and the co-worker in the rest home are all examples of this "direct screamer." Other bullies might fall into the direct but more "subtle bully" or "discreet bully." The administrator's co-workers who ignored her, the provost who gave the assignments to the assistant dean, the supervisor for the other university administrator who gave directions to not speak to co-workers during working hours, but gave a "business reason" for this policy, the supervisor conducting the seat check, the dean piling up the work, etc. All of these bullies were direct in their actions. There was no doubt who was perpetrating the act. However, any intent to intimidate, any anger, any threat in their actions was much less clear in these methods. Further, it would also appear that in many of these cases, the bully could turn to policy to blame, thus holding themselves harmless. Finally, there is what could be termed the "sneaky bully." This is the bully who has the nice friendly persona to the public and, in most cases, face-to-

face meetings. At least two bullies were described like this in the course of the interviews. First, this is how several university employees described a university president. At least two people stated he was extremely friendly to your face, but would quickly stab you in the back and work against you in any possible way if you ever disagreed with him. My own experiences show that this bully wanted to hide behind others to disguise his bullying behavior. When he exerted control over my communications, according to my dean, he told my dean to tell me not to send any more letters. I was not to know this message came from the president. When I was asked to step down from the director position, this same method was used. This decision was to come from the dean; I was not meant to know that this decision came from the president or the reasons for this decision. The retiring faculty member also summed up the former provost as “extremely friendly and pleasant until you were out of sight.” This bully was another example of a “sneaky bully.”

Finally, another theme of the “trickle down bully effect” began to emerge in the course of the in-depth interviews. One university faculty member stated that his bully, the dean of his school, bullied because she felt pressure from above. The more that was expected of her and the more intimidated she felt, the more work she would unfairly assign to him, and the more likely she was to take credit for his work. Another faculty member shared an example of a provost being forced by the president to intimidate him to attempt to prevent him from going to the state legislature to discuss university issues. Another university employee referred to the university president’s staff as his henchmen, stating that he picked his staff based on whether they would go along with everything he said and if they were willing to bully others. I personally experienced this with this president, as my former friend became the bully who forced me out of my position as director at the request of the president. In fact, the president went as far as to assure this bullying by making this a condition of this bully accepting

the position of dean of the school. For the hotel worker, the trickle-down effect occurred not because the hotel manager was a bully, but because the hotel manager did not want to deal with anything and could be said to be an absent leader. As a result of this, the assistant manager had free reign to bully this participant and her co-workers. The local school employee also stated that leadership's unwillingness to deal with a supervisory-level employee led to this employee being able to bully her and other co-workers.

While these behaviors vary greatly, they all fit within my working definition of workplace bullying—the unwanted, unwelcome abuse of any source of power that has the effect of or intent to intimidate, control, or otherwise strip a target of their right to esteem, growth, dignity, or other human rights in the workplace. Because I am interested in understanding bullying from the perspective of the targets of such behavior, I wanted to further test this definition of workplace bullying through the focus groups.

In all three focus groups there was a consensus agreement that this definition made sense. During the first focus group, one participant had some concern that the abuse of any source of power might end up being defined as only formal power. Further, during two presentations of part of this work to business school faculty, the concern was raised that management in general and organizational practices are deliberately designed to be a means of control (i.e. controlling behavior in such a way as to meet organizational goals). In fact, in the field of management, management is often defined as planning, organizing, leading, and *controlling*. However, both of these concerns can be readily addressed by adding further explanations to this definition, and, in fact, each element may need some further definition. Based on the discussion above and this research, this would include the following.

First, in defining “unwanted” and “unwelcome,” it is important to remember that targets of workplace bullying and/or harassment will react to bullying in different ways. Some may complain immediately, while others may internalize such abuse. Some may be comfortable discussing these behaviors and the outcomes, while others may not be able to discuss the specifics. However, these different reactions do not and should not be used to determine whether the behaviors were unwanted or unwelcome.

When defining the abuse of any source of power, it is first important to understand there are many different sources of power, whether positional or formal or personal. Bullies may abuse power through collective or mob actions, through information that gives them power, or even through physical threats. Second, not every use of power is bullying. Instead, the behavior only rises to bullying where the source of power is abused. Leadership is one example of an acceptable use of power. In valid leadership, leaders may rely on various sources of power. An example of this occurs in the film “Twelve O’Clock High.” I have used this movie in leadership training in college courses and in training of leaders in organizations. In this movie, Frank Savage takes over the lead of a “hard luck” fighter squadron. Savage’s leadership techniques appear at times to be very harsh compared to those of the former leader, Davenport. However, under Davenport, planes are being shot down and men are dying at a high rate. Savage brings order to the squadron to help the squadron to achieve its goals and to protect the men. Oftentimes, students identify Savage as a bully. However, once they see that his leadership techniques had a legitimate purpose and discuss why techniques such as one-way communication, the use of coercive power, and the use of punishment were necessary under the circumstances, they begin to see how this was really effective leadership and not bullying. What is key to Savage’s leadership not being bullying is the fact that his tactics are used to meet the needs of the followers. These tactics by Savage are not only used to help the squadron

meet its goals, but are also applied to build the individual pilot's esteem, growth, and dignity. For these reasons, Savage's actions would fall outside of this definition of workplace bullying. Where the use of power from the perspective of an outsider or the target of such behavior may appear to be abusive, the accused should be afforded the opportunity to defend their actions based on the reason, appropriateness, or necessity of such use of power, just as Savage's behaviors may need further explanation.

Finally, employers cannot guarantee that each individual employee will have a high level of esteem, growth, or actualization. Rather, the concern here is to address those behaviors that deny an employee the respectful treatment he/she deserves as a human being and/or those behaviors that unnecessarily impede an individual's opportunity to feel esteem, value, growth, and actualization or to express his/her voice regarding his/her own work and working conditions.

CHAPTER SIX:
INSIGHT SECTION TWO: GAINING INSIGHT INTO THE OUTCOMES AND
PERVASIVENESS OF WORKPLACE BULLYING AND TARGETS' REACTIONS
TO WORKPLACE BULLYING

In addition to understanding what phenomena may be described as workplace bullying, it is important to also gain insight into the outcomes of workplace bullying. In fact, a human rights definition of bullying is focused on whether actions result in the outcome of damage to the dignity of the victim. Therefore, the key to defining bullying is to focus on the effect on the victim. Namie and Namie observe, “the most important defining characteristic is that the bully’s actions damage the Target’s health and self-esteem, relations with family and friends, economic livelihood or some combination of them all.”¹³² Unlike the US definition of harassment discussed in Chapter Eight, the focus for my definition of bullying is not only about job outcomes, but also about any other negative outcomes to the targets of workplace bullying. Just as I have hypothesized that workplace bullying will take many different forms, I also started this research with the hypothesis that workplace bullying will affect targets in different ways. Some effects may be job-related, while others may only be seen outside of work. Whether the behavior impacts the employee’s work is a relevant issue, but there are other potential unacceptable outcomes of workplace bullying that should be considered. Bullying occurs anytime one is stripped of their dignity in some manner; this may or may not affect their work life. The outcomes I am concerned with are those that create a situation where someone is forced to live (even if only during their time at work) as less than what they are entitled to as a human being. In the Quebec legislation on psychological harassment, this same standard seems to apply.

¹³² NAMIE & NAMIE, *supra* note 1, at 3.

The same footnote explaining that a single act may indeed be psychological harassment also states, “such behaviour may also constitute psychological harassment if it undermines the person’s psychological or physical integrity.”¹³³

The second research question I will explore in this study is, What are the effects of workplace bullying? Because I am most interested in exploring employee rights, I am most interested in the effects on the targets of workplace bullying. However, I will also explore, at least in a limited fashion, the effects workplace bullying may have on organizations and even society. This exploration again will utilize the qualitative methodologies of interviews and focus groups. I will also conduct a literature review to summarize past findings.

Effects on Individuals

The effects on the targets of bullying can be devastating. These effects can be felt on the job and in the personal life of the victims of bullying. Bullying can lead to excessive worry, anxiety, and stress that may even destroy the target’s career.¹³⁴ Bullying has also been found to lead to resentment, fear, and lower self-esteem. Bullying has also been linked to symptoms consistent with post-traumatic stress syndrome, suicidal thoughts, and attempts.¹³⁵ There is also clear evidence that some victims of bullying end up committing suicide,¹³⁶ or die from illnesses related to the workplace bullying.¹³⁷ Bullying may be “a more crippling and devastating problem for employees than all other work-related stress put together . . .”¹³⁸

¹³³ Quebec Ordinance, *supra* note 105.

¹³⁴ Gardner & Johnson, *supra* note 6, at 28.

¹³⁵ Keashley & Neuman, *supra* note 7, at 346.

¹³⁶ RAYNER ET AL., *supra* note 8, Ch. 3, at 51.

¹³⁷ DAVENPORT ET AL., *supra* note 9, Ch. 1, at 33.

¹³⁸ Einarsen, *supra* note 5, at 16.

For the targets of bullying that I observed and talked with, the most common effect was damage to their career. Many targets left their organizations at least in part due to the bullying they experienced. One individual who explicitly described the leader of his organization as a bully decided to retire early to get away from the bullying culture of this organization. This individual had been removed from committees when his expertise cast doubt on the leader's decision making in the organization. He also felt he had been intentionally left off of a list of past faculty award winners. In this case, bullying was used as a means of control or perhaps control was used as a means to bully. Another individual sought out a new job. The financial planning intern decided, as a result of the actions of his workplace bully, that the financial industry was not going to be part of his career. While one target of bullying did not have a direct work outcome, she stated that many other employees at her workplace were unable to reach their full potential and that many employees were forced to quit their jobs as a result of her bullying boss.

For many other participants, the bullying did not have a direct tangible impact on their work, but they still suffered from being bullied. One research participant specifically stated that the confrontational, schoolyard type of bullying that she experienced from a co-worker did not allow her the dignity to which she had a right. For another individual who continued to be successful in her career in a mid-sized university, the less obvious, more covert bullying from the leaders in the organization led to her being physically sick and even perhaps the thinning of her hair. While there was no direct job effect, this individual decided to look for another position. Another research participant who was bullied into being "Poky-Perfect" was still a very successful waitress with her employer, but she felt objectified and degraded. Over the several months of this study she often told me she was considering quitting.

Within just a few interviews of the targets of workplace bullying, it became clear that the effects of bullying could not always be measured in terms of work-related outcomes. Many targets of bullying continued to work very well, and may have even been promoted. However, even in these cases, the bullying did still have unacceptable consequences to the rest of their lives. These effects were to the participants' morale, psyche, dignity, or esteem. In workplaces that allow for or even promote workplace bullying, employees are incapable of meeting their higher-level needs. Further, workplace bullying even at the low grade level may interfere with the targets' most basic physiological and/or psychological needs.

"Humiliation," "anger," "objectification," "belittled" were all common themes of the research responses. Many of the research participants felt degraded. The employee whose boss harassed her about her divorce and proselytized to her about religion stated that she felt "belittled." The waitress who was told to be "Poky-Perfect" stated that she felt objectified, or less than human. One research participant worried that she herself would become mean if she stayed in the bullying environment. Another research participant compared the effects of her workplace bullying to childhood experiences she had with bullying. She explained that the bullying made her feel isolated, worthless, and like nobody liked her. Her bullies both as a child and at work had stripped her, at least in part, of her right to esteem. This same feeling of worthlessness was shared by both of the female university administrators as well as the former telemarketing employee. It is clear that workplace bullying negatively affects employee rights to dignity, esteem, growth, and voice. Based on the responses of these research participants, to protect employee dignity, workplace bullying must be eliminated.

Even if workplace bullying were not a pervasive problem (although the research clearly suggests otherwise), steps to eliminate any and all workplace bullying

should be taken. Even if taking steps to eliminate workplace bullying would only provide greater dignity to one employee, or prevent one employee's right to dignity from being violated, it is still a worthy cause. The effects of workplace bullying can be devastating to a victim. It is clear that a person who is living with these effects is not living with the type of dignity to which all human beings are entitled. Eliminating workplace bullying from these different employers would have protected the dignity of at least these 16 research participants. Further, the pervasiveness of this problem, as will be discussed below, makes resolving this problem a societal issue rather than merely an individual one.

Effects on Organizations

Simply looking at the effects of workplace bullying on employees should be enough to convince employers to address this issue, and for the ethical or moral employers, this would most likely be enough to convince them to take steps to eliminate workplace bullying. However, the reality is that many employers put profit before even the most basic human rights of employees. For instance, profits come before safety for many miners, meatpackers, and others working in dangerous jobs.¹³⁹ Profit comes before the right to education and a childhood for MNCs that either directly use child labor or purchase products from manufacturers using child labor.¹⁴⁰ The right to a decent standard of living comes second to every employer that pays less than a living wage.¹⁴¹ Therefore, for many employers it will take more than pointing

¹³⁹ For an example *see* LANCE COMPA, BLOOD, SWEAT AND FEAR: WORKER'S RIGHTS IN THE U.S. MEAT AND POULTRY INDUSTRIES (Human Rights Watch 2004).

¹⁴⁰ *See* <http://hrw.org/children/labor.htm>

¹⁴¹ For a discussion of a living wage *see* WILLIAM P. QUIGLEY, ENDING POVERTY AS WE KNOW IT: GUARANTEEING A RIGHT TO A JOB AT A LIVING WAGE (Temple University Press 2003) and also BARBARA EHRENREICH, NICKEL AND DIMED (2001) for a look at the conditions of working in jobs at less than a living wage.

out the human rights violations that occur when workplace bullying is allowed to exist. For this reason, I will look at the organizational impact of workplace bullying.

Just as workplace bullying can be devastating to victim employees, the effects can also be quite severe for organizations. Workplace bullying can lead to tragic events such as the report of two separate airline accidents that resulted from flight crews being afraid to question pilot decisions, or life-threatening and even life-ending medical mistakes in health care environments where the stress and fear from bullying interferes with the practice of medicine.¹⁴² Even where effects are not as catastrophic, they can still be devastating for organizational performance. Bullying in the workplace leads to lost work time, reduced organizational commitment, and decreased effort at work.¹⁴³ Workplace bullying has also been found to lead to higher turnover rates¹⁴⁴ and potentially to increased lawsuits.¹⁴⁵ Workplace stress and workplace bullying cost employers billions of dollars.¹⁴⁶

Many devastating effects to organizations were also identified by the research participants. In the case of the former member of the armed forces, he was bullied because he questioned tactics he felt were wrong. Just as in the case with the airline pilots, a commanding officer who has bullied his reports into not asking questions may indeed lead to the loss of life. Further, the administrator at the mid-size university felt that the bullying had led to an aura of distrust. She also stated that the bullying tactics employed by the president had led to a fear of questioning his decisions and, as a result, decisions that were detrimental to the university often went unchecked. At this

¹⁴² Keashley & Neuman, *supra* note 7, at 350–351.

¹⁴³ Yamada (2004), *supra* note 2, at 481.

¹⁴⁴ Coleman, *supra* note 16, at 265.

¹⁴⁵ Gardner & Johnson, *supra* note 6, at 29.

¹⁴⁶ According to Wilson, 5–6 **billion** dollars is lost annually in the U.S. alone due to “real or perceived abuse of employees by employers.” Keashley & Neuman, *supra* note 7. A 1998 ILO report concluded that stress at work cost the US \$80 billion per year. Gardner & Johnson, *supra* note 6, at 29. In fact, according to Coleman, 20% of all workplace disease claims in the United States can be linked to stress. Coleman, *supra* note 16, at 265.

university, several of the research participants left during the course of this study due to the bullying atmosphere. Many faculty members expressed a desire to leave this environment, and many others mentioned they would most likely retire early to get away from a bullying president. Further, this university experienced many financial and budgeting problems and decreased campus enrollment under this president's leadership. For the bullying optometrist, the bullying may have been at least partially responsible for an extremely high turnover rate. Further, we may never fully understand the effect on these organizations, or even on our economy and society as a whole, that results from individuals who are very good at what they do leaving their jobs, looking for other positions, or simply being unable to focus on their work. Just as bullying can be devastating to the individual targets, it can also be devastating to the organizations that allow or even promote workplace bullying.

Pervasiveness of Workplace Bullying

As discussed in the introduction of this dissertation, not only is workplace bullying extremely damaging, it is extremely common and prevalent. The results from my research also suggest bullying is very prevalent. As mentioned earlier, the first step for all research participants was to complete a survey. In all, 61 surveys were completed, and of these, 28 reported they had been bullied in the workplace, 43 reported being mistreated, and all but 3 of the respondents indicated they had experienced at least one of the negative behaviors on the survey at work at least "now and then." Further, during the course of all three focus groups, the question was posed as to whether or not bullying was uncommon. In each of these focus groups, it was concluded that bullying was more the norm than the exception. It was hardly difficult to find research participants who felt they had been bullied. While my research does

not determine an exact rate of prevalence, clearly, bullying in the workplace is all too common.

Insight into Workplace Bullying: How Do Targets React and What Are their Thoughts about Potential Remedies?

With the different types of bullying that occur and the differing outcomes, it would be unrealistic to think that all targets of bullying would react in the same manner. As was partially discussed in Chapter Five in analysis of the “unwanted” element of the definition of workplace bullying, the response from targets will vary. This variance in responses was hypothesized at the beginning of this research, and the information from the 16 research participants supports this hypothesis.

Amongst the research participants in this study, the responses they took to remedy workplace bullying were widely varied. Of the 16 interview participants, 7 at one time or another filed some form of formal complaint to their managers. However, at the time of the interviews, only one still felt confident in reporting a complaint to a manager or a formal employer complaint system. Of the 6 who reported to the employers at one time, 5 now had no confidence in reporting a complaint to an employer because of their specific experiences with their initial complaint. The hotel workers’ general manager simply pushed the complaint back down to the assistant manager who was bullying the employees in the first place. One university staff member felt complaining worsened the bullying, and another believed filing a formal grievance would be “career suicide.”

Other participants did not file a formal complaint because they were not sure they had a legitimate complaint. One of the university staff members felt that perhaps she was a complainer for even taking part in this research. However, after the interviews and participation in a focus group, she felt much stronger that her rights had

been violated. The financial services worker also felt that maybe he was just overly sensitive or did not really have a right to complain. Other participants did not report to their manager because the bully was the owner, they felt management supported the bully, or they had no confidence in the employer system as a result of observation of other employee's experiences.

Two participants responded to their bullying through interpersonal communication with their bully. One participant, the office manager, confronted her bully, or "bullied back," on numerous occasions. The office manager's response tended to stop the bullying for a short time, but others in the workplace would still bear the brunt of the optometrist's bullying. Another target, the soldier, dealt with his bullying through ingratiation. When his bullying commanding officer's grandmother died, this soldier made sure to send flowers to her funeral. This seemed to alleviate the bullying.

Several targets engaged in self-help methods. For instance, one university staff member would call her mother and discuss her work. The financial services intern would get his frustration out on his long drive home from work by listening to music. Targets often responded by separating from work in one way or another. The faculty member who has since retired stopped devoting as much time to service activities for the university, focused on his own office outside of the university, and eventually retired early. The two university staff/faculty members in their thirties both began to look for other employment. The telemarketing worker quit, as did the health care supply worker. Even the office manager eventually left the optometrist's office after ten years, at least in part due to the bullying. The worker in the oil and gas industry has also switched employers, the big-box worker continues to look for other employment, and the school physical therapist simply attempts to avoid her bully. Several of the university employees became actively involved in an organizing

campaign. I myself also became very active in the local AFT as a result of my observations of and experiences with bullying at this university.

For all but one of the 16 respondents, the outcomes of their own responses to the workplace bullying were less than satisfying. This made for very interesting discussion of potential solutions to workplace bullying. During the interviews and focus groups, I specifically asked about employer complaint systems, unions, alternative dispute resolution (mediation and arbitration), and a new statute as potential remedies. The employer response systems garnered very little support. During one focus group, a participant suggested this would be like the foxes guarding the henhouse and that not only do employers typically know that bullying occurs, but they support it unless it gets in the way of profit. Even the participant who still had confidence in reporting complaints felt that there should be more protection for targets of bullying and harassment than reliance on employer-based systems.

Unions appear to be a favored method for dealing with workplace bullying. Four of the interview participants worked at a university that was in the midst of an AFT organizing campaign. However, this state university is in a state where state employees do not have collective bargaining rights. Of these four, three were very supportive of the current AFT efforts. All four stated that they felt collective bargaining rights would end the bullying at this university, and all four were strong supporters for collective bargaining rights for state employees. Of the other twelve research participants, ten strongly supported a union as a solution. An additional participant, the telemarketing employee, also supported organizing as a remedy, but suggested that an employer would simply thwart the campaign and things would be worse for any union supporters. He based this statement on experiences his wife had at her current employer. The other research participant stated that she was not knowledgeable enough about unions to say one way or the other.

ADR methods such as mediation and arbitration received lukewarm responses. Only one individual, the former medical supply employee, said she would be very supportive of either arbitration or mediation. Seven respondents stated they really did not have enough knowledge about ADR to feel confident that this would solve the problem of workplace bullying. During one of the focus groups, one participant felt that ADR methods would become employer dominated. This participant had recently completed a course in ADR. After a discussion of this possibility, the entire group was skeptical of both mediation and arbitration as a potential remedy.

Finally, there was fairly strong support for a legal remedy. The food services worker at the rest home stated that she felt she should have legal recourse. In each focus group as a definition was developed, the group consensus was that the definition coming out of this research could be used in an anti-bullying statute. All sixteen of the respondents felt that they should have had greater legal protection available and that other targets of bullying should also have legal recourse. The only concern from several of the participants was whether or not a statutory response was feasible. For these respondents the concern was the difficulty in defining workplace bullying.

Responses to workplace bullying vary widely because targets are often not sure of what potential remedies are available, and even when they are sure, these remedies are inadequate. Not a single respondent mentioned a specific employer anti-bullying policy. As will be discussed below, none of the respondents had a clear legal claim, and while confrontation worked for some targets, for others confrontation exacerbated their situation. In order for workplace bullying to be addressed, targets must have a remedy available that they are fully aware of and that they have confidence in. Based on the respondents in this research, collective bargaining/organizing and formal legal protections should be explored first.

CHAPTER SEVEN:

SUMMARIZING THE INSIGHT INTO WHAT IS WORKPLACE BULLYING

Common Themes—Power, Control, and Helplessness

Workplace bullying is about power on both the target's side and the bully's side. On the side of the bully, as stated in the definition of bullying I have developed through this research, bullying is an abuse of some source of power. The bully may rely on formal or positional power or may rely on sources of personal power, but in some manner the bully relies upon and abuses their power over the target. Duncan Green defines four types of power—power over, power to, power with, and power within.¹⁴⁷ For the target of bullying, in some way or fashion they are stripped of one or more of these powers identified by Green.

Power in some form played a role in every example of workplace bullying. During the first focus group, I asked the participants to recall any bullying they experienced as children. The female hotel worker shared an experience of two sisters controlling all of the kids in her neighborhood. She was unable to initially determine the source of the power these girls had over her, but she did express that something made them very powerful. For some of the participants, the bully's power was formal—the commanding officer, the owner/optometrist, the owner of the restaurant, etc. For others, the power was physical intimidation such as the experience of the female food service worker, and the female staff/faculty member of the university. In the case of the financial services company, the CSA seemed to use an apparent knowledge power—knowledge of the laws, knowledge of when an audit was coming, knowledge about the clients. In every case, power was a theme, and without an

¹⁴⁷ DUNCAN GREEN, FROM POVERTY TO POWER: HOW ACTIVE CITIZENS AND EFFECTIVE STATES CAN CHANGE THE WORLD 28–29 (Oxfam International 2008).

imbalance of power, bullying would not have occurred. Further, in every case there was evidence that the power was used in some illegitimate fashion.

The waitress at the local restaurant was forced to dress in what the owner felt was a “Poky-Perfect” style. The owner exerted her control over the wait staff’s hairstyle, dress, make-up, even shoes. There was no flexibility. When a staff member was slightly different from the owner’s expectations, he/she would be chastised for the day, even if he/she dressed in a clearly appropriate and fashionable manner. The owner exerted her own legitimate power to set the dress code for her restaurant. However, the extreme level of this dress code was an abuse of her power. The owner also exerted her reward power by recognizing those that were “Poky-Perfect.” However, this power was abused when it was used in a public manner to humiliate the workers who were found to be less than “Poky-Perfect.” For the waitress, she was stripped of her “power to,” defined by Green as the capability to decide actions and carry them out. The waitress could not decide her own dress in any manner. Her statements also indicate the bullying affected her “power within.”¹⁴⁸ She stated that she felt degraded and objectified by the dress code. Finally, employees at this restaurant were also stripped of their “power with.”¹⁴⁹ The method of enforcing the dress code was divisive amongst the employees.

The same pattern existed in all of the examples of bullying that were shared by the research participants. The food service worker’s bully tried to make it very clear that she expected this “little girl” to listen to her to do her job the way she felt she should do it. She was going to do so or “face a beating.” Clearly this was an abuse of what she perceived as her physical power over the research participant. The bully tried

¹⁴⁸ The power within is defined by Green as personal self-confidence . . . which influence what thoughts and actions appear legitimate or acceptable; *see* GREEN, *supra* note 147, at 28.

¹⁴⁹ The power with is defined by Green as collective power, through organization, solidarity and joint action. *Id.* at 29.

to take away this participant's "power to" decide how she would conduct her work. She attempted to strip her of her "power within" through these threats of physical intimidation. The medical equipment worker was made to feel that she was not to question the decisions of her supervisor in any manner. It did not matter if the supervisor was treating the less well-off customers in an unfair fashion. This bully made sure to demean this worker in any manner to assure she would not speak up again. By doing so, this bully was stripping her target of her "power to" make decisions at work, and to assure she was stripped of this power,¹⁵⁰ she continued to attack her "power within" through attacks on her esteem. The bully abused her position power, and perhaps her relationship power with the company's upper management, to assure her actions were not questioned.

Likewise, the commanding officer was assured his control of the unit by silencing the dissenting voice, taking away the soldier's power to be involved in decisions, and squashing any possibility of power with his fellow soldiers. If this research participant wanted to dissent or bring up concerns, then he would not get any leave time. The CSA at the financial services company assured herself complete control of everything that occurred in the workplace. The CSA even controlled the intern's lunch hour, as he felt compelled to keep checking on his desk for fear that she would find something wrong or out of place. Bullying often seems to be the opposite of voice. It often manifests itself in a form that eliminates any possibility for the target to voice his/her thoughts or opinions, taking away the target's power to. Oftentimes the bully attempts to strip the target of their power with and power within to assure the bully continues to have power over the target and that the target does not gain any power to. In every case, the participants indicated the bully either attempted to control his/her behavior or did control the target's behavior.

¹⁵⁰ *Id.* at 28.

Returning to the dictionary definition of bullying—dominating, browbeating, intimidating all seem to be focused around control. Looking at all of the responses of the research participants, another theme that clearly emerges is the theme of control. In each case the bullying behavior can either be described as an attempt to control or described as having the effect of control through the abuse of the bully's power and the stripping of the target's power.

At the university in the study, the president attempted to control any dissenting voice. From my own perceptions as a participant observer and from the perceptions of the research participants, the president created a culture of bullying to allow him to push through his agenda. When the agenda lacked financial stability, the financial expert on the budget committee was removed when he questioned the financial plan. When longtime successful teachers questioned the new direction for class sizes, common syllabi, and other steps that conflicted with their teaching style, they found they were denied senior professor positions. When faculty agreed with the president's agenda, they were promoted and placed in positions of power, and then often undertook their own bullying. University staff were controlled through seat checks, threats, and demotions by some of these proxy bullies. The restaurant owner attempted to control every detail of the wait staff's dress; the CSR attempted to control even the lunch hours of the financial interns and other financial analysts at this employer.

In the majority of cases, there was also a theme of helplessness. None of the research participants referred to any type of help available to them. Only one participant received any type of true relief by reporting her experiences to her supervisor. In this case, the mayor fired a police officer who had bullied her when she was the clerk of the town. However, the officer retaliated through the media and using the local paper as a forum to continue to bully this individual. The rest of the participants never referred to reporting as an option. Many of the participants turned to

some form of self-help. For the optometrist office manager, this entailed confronting the bully. This did not stop the bullying altogether, but seemed to make the workplace better. The soldier turned to ingratiating techniques such as buying flowers for his CO's grandmother's funeral. Again, this seemed to alleviate the bullying or at least made the workplace bearable. However, the most common self-help theme was to leave, retire, or search for a new job. None of these options addresses bullying, however, and still suggests a level of helplessness.

Further, it became clear in speaking with the research participants that a common outcome of workplace bullying was damage to self-esteem, dignity, growth, or other higher-level human needs. While job outcomes varied for the targets of workplace bullying and even the physical effects varied, there was a common theme that bullying led the targets to feel less than valued or less than dignified in their places of work.

From this summary of the research respondents' stories, a theory emerges. This theory is that workplace bullying is underreported due to inaccurate internal and external definitions of workplace bullying. In the research on workplace bullying, reports of bullying have been underreported because of the definitions provided by researchers. These definitions may include some of the elements discussed above and earlier in Chapter Four, such as intent or repetitiveness, that eliminate true incidents of bullying from the research. Specific exclusions such as Tracy and colleagues' exclusion of low-grade incivility also eliminate true incidents from consideration in the research. However, there also appears to be an underreporting due to targets' own internal definitions of workplace bullying. In this research, I experienced on numerous occasions a gaining-of-consciousness experience for many of the participants. On the individual level, this is most clearly exemplified by the university staff member who felt guilty for even complaining about her working environment during the research

interview. It was not until she read the survey and began to think about her situation that she even considered her experiences to meet any definition of workplace bullying. During the interview process and the focus groups she gained a greater consciousness that this problem with bullying was not her own isolated experience, but was a collective problem for much of the working class. This same type of gaining consciousness occurred for numerous participants, including the finance intern, who stated he had never considered his experience bullying until he completed my survey, and at that point he felt it was a perfect example of workplace bullying. So from this I believe that it is likely that as employees become aware of the extent of bullying and have the opportunity to step back and to reflect on their own working environment, there will be an increase in the number of reports of bullying as these employees gain a consciousness about their own situations.

While the participants' experiences, outcomes, and responses to workplace bullying all varied, there were common themes in each of these areas. There were also common themes in the research respondents' opinions regarding acceptable remedies to bullying. Overall, there was very little support for the reliance on any type of employer system to correct the problem of workplace bullying. The participants were all skeptical that employers would ever choose to combat workplace bullying on their own. Instead, the research participants supported either collective bargaining/organizing to confront workplace bullying and/or a formal legal response.

This summary of the findings in the in-depth interviews and focus groups further supports the definition that I have developed through this research: workplace bullying is the unwanted, unwelcome abuse of any source of power that has the effect of or intent to intimidate, control, or otherwise strip a target of their right to esteem, growth, dignity, or other human rights in the workplace. This research also has supported my initial hypotheses that workplace bullying experiences will vary and that

the targets of bullying will suffer different outcomes and react in different ways to workplace bullying. This research has also led to a number of potential future avenues for research. First, the new definition of workplace bullying I have developed here could be further tested through qualitative methods such as focus groups and through quantitative research. Second, further research could be conducted to see why targets suffer different outcomes and respond differently to bullying. Perhaps common patterns of outcomes and/or responses might emerge based on the target's background, level of employment, employment security, or other factors. My research suggests that there is a need to explore further why there is little support for employer-based systems to remedy harassment and the potential for the legal remedy as well as collective active solutions. Perhaps this lack of support only existed within my group of research participants. Perhaps this was a product of the working environment in the geographical area of my research. As I mentioned in Chapter Two, when discussing limitations of this study, the federal jurisdiction of this area is very conservative and employer-friendly. Perhaps as a result employees tend to be skeptical of their employers and I would find different results in other locations. The support for a legal remedy and the support for collective action should also be explored. Perhaps addressing workplace bullying in an election campaign may help to gain support for unionization. If there is support for a legal remedy, research should be conducted on what needs to be done to get to this formal legal remedy.

My research suggests that there is a need to explore various avenues and roles to eliminate workplace bullying. The pervasive, severe, and diverse nature of this problem in the workplace suggests that a solution to workplace bullying will not be a simple matter. However, based on this research, a key to the solution of workplace bullying is balancing power and control. Any viable solution will have to limit the power of workplace bullies, protect the power of potential targets of workplace

bullying, limit the control of bullies, and protect the targets' control over their own work lives. These potential avenues will be further discussed in Chapter Eleven.

Finally, the qualitative interviews and focus groups especially have also indicated that a second type of consciousness occurs for targets of workplace bullying under the correct circumstances. In addition to the individual consciousness about their own situation and their own personal individual rights, by discussing the experiences of other employees and by hearing that they were not the only employees to suffer from workplace bullying, a collective consciousness emerged. Participants began to feel empowered and displayed empathy and perhaps even anger over the other research participants' situations during the focus group. Statements such as "I know exactly what you mean," and "that is so unfair" became very common during the focus groups. Further, a distrust of employers and their willingness to confront these problems grew during the focus groups. As I observed these focus groups it appeared that as the participants discussed solutions to workplace bullying, they began to reach a consensus that employers as a group would not take care of these situations and perhaps might even support bullying. Many of the statements that led me to this conclusion are provided earlier in this chapter and also in Chapter Six. However, it is this gaining of collective consciousness that I witnessed from these participants that has led to the second theory I developed in this research. This theory is that workplace bullying leads to union/collective action support. This also suggests that by addressing workplace bullying as an organizing technique, union organizers could increase their support and success rate. It is this collective consciousness that seems to at least in part explain the strong support for unions as a method of resolving workplace bullying.

CHAPTER EIGHT:
INSIGHT SECTION THREE: INSIGHT INTO WHAT HAS BEEN DONE TO
ADDRESS WORKPLACE BULLYING IN THE UNITED STATES

Having gained some insight into workplace bullying and its effects, it is clear that workplace bullying is a severe and pervasive problem for American workers and their organizations. With that in mind, my next research question is, “What has been done to address workplace bullying via the US legal system?” To answer this question, I will conduct a basic legal review of the various potential remedies to workplace bullying. I will then compare the information obtained through the in-depth interviews and focus groups to assess the efficacy or potential efficacy of these US laws to address workplace bullying.

While the US legal system has never specifically addressed workplace bullying, there are two areas of law that currently exist in the United States to deal with aggressive, menacing, or harassing behavior at work. First, under Title VII, the ADA, ADEA, and under most state human rights laws, harassment based on protected status such as race or gender is unlawful. The second protection against these types of behaviors comes via state common law, most notably in the form of claims of intentional infliction of emotional distress (IIED) and, potentially, other tort claims. However, neither of these avenues is adequate to eliminate bullying from the workplace. In this section of this dissertation, I will address both of these potential remedies to workplace harassment as well as explore other potential avenues of legal redress in the United States.

Insight into Protection from Workplace Harassment under EEO Laws

Workplace bullying has often been compared to the US standard for unlawful workplace harassment under Title VII, and expansions of Title VII coverage have been offered as potential solutions to the problem of workplace bullying. For instance, in 2000, David Yamada suggested that bullying be addressed through an intentional infliction of a hostile work environment tort.¹⁵¹ This language, of course, follows the terminology of the hostile work environment type of actionable harassment under Title VII. In the same year, Brian Lehman suggested the need to expand Title VII to directly address all forms of sexual harassment. This expansion would cover additional if not all forms of workplace bullying.¹⁵² Chow suggests eliminating the defense of “play” from harassment claims to expand the number of cognizable claims under Title VII.¹⁵³ All of these researchers suggest an expansion of Title VII that would allow for greater coverage and elimination of acts of workplace bullying.

While the actions that entail workplace harassment often mirror actions that constitute bullying, these similarities are not enough to assure that victims of workplace bullying will be afforded adequate protection under the EEO laws. The definition of unlawful workplace harassment in the US legal system is far from an adequate definition of workplace bullying. The focus of the US workplace harassment law is not to prevent bullying or to protect all employees’ right to dignity at work; there is no focus on the human needs as outlined by Maslow. The legal interpretations of workplace harassment in the United States do not address the role of the employers from a Corporate Social Responsibility or Catholic Social Tradition Standpoint.

¹⁵¹ Yamada (2000), *supra* note 2.

¹⁵² Brian Lehman, *Why Title VII Should Prohibit All Workplace Sexual Harassment*, 12 YAL. J.L. & FEMINISM 225 (2000).

¹⁵³ James C. Chow, *Sticks, Stones, and Simple Teasing: The Jurisprudence of Non-Cognizable Harassing Conduct in the Context of Title VII Hostile Work Environment Claims*, 33 LOY. L.A. L. REV. 133 (November 1999).

Instead, the only focus of statutory workplace harassment law is to eliminate certain forms of discrimination. Further, these forms of discrimination are often very narrowly construed in a way to protect the current corporate power structure while exposing many targets of workplace bullying to legally protected abuse. The legal interpretations of workplace harassment give little regard to the potential of positive rights in the workplace, such as the right to dignity, the right to a voice, or the right to safe and healthy working conditions. Instead, the interpretations take a completely negative rights approach and focus on what the perpetrator cannot do (i.e. cannot repetitively touch another employee in an unwanted and sexual manner or cannot offer job benefits in exchange for sexual favors). Finally, the interpretations of workplace harassment pay little concern for any outcomes other than direct work outcomes. The potential damage to the target's psyche, morale, family life, social life, or esteem is afforded no concern or protection.

For the targets of bullying, this protection is not enough. Bullying does not discriminate. Bullies do not only target members of protected classes. Bullying does not occur in only an overtly sexual manner, or in clear derogatory racial terms. Any individual could be a target, and there is no protected status that covers bullying victims. A legal response to workplace bullying must instead focus on actual power structures in organizations (formal and informal); must focus on employees' rights to dignity, esteem, voice and growth; and must recognize the impact bullying has not only at work but also on the lives of the targets.

Elements of a Claim for Unlawful Harassment:

According to 29 C.F.R §Section 1604.11 Sexual Harassment:

Harassment on the basis of sex is a violation of section 703 of title VII.
\\1\\ Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1)

submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) **such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.** (emphasis added)¹⁵⁴

Harassment on the basis of other protected statuses, such as race, color, national origin, religion, age, and disability, can be defined in a similar manner.¹⁵⁵ There are many holes in this definition of harassment that will allow the vast majority of workplace bullying in the US to go unaddressed. The status-based requirement is perhaps the most obvious of these. However, the focus on the working environment, the focus on work-related outcomes, and the standard for defining hostile and offensive all leave major gaps in coverage of some of the most common forms of workplace bullying.

Focus on discrimination versus dignity

The focus on discrimination in the US harassment laws leaves the majority of targets of workplace bullying unprotected. According to Namie and Namie, less than 25% of workplace bullying targets are targeted based on a legally protected status. However, to bring a Title VII claim the plaintiff must have been discriminated against based on a protected status, leaving 75% of bullying cases outside of the coverage of

¹⁵⁴ Sexual Harassment 29 C.F.R. § 1604.11 (1999).

¹⁵⁵ From the EEOC web site at <http://www.eeoc.gov/types/harassment.html>. Harassment is unwelcome conduct that is based on race, color, sex, religion, national origin, disability, and/or age. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.

the EEO laws. In *Oncale v. Sundowner*, the Supreme Court cites the concurring opinion in *Harris v. Forklift*, 510 U.S. 17 (1993), to make this point: “The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not opposed.”¹⁵⁶ There is a clear requirement that the harassing behavior be based on a protected status for a plaintiff to sustain a claim under any of the EEO laws.

Not only are many instances of bullying eliminated from coverage because they are not based on a protected status, but in some cases, courts make it extremely difficult to prove that the harassment was based on a protected status. For instance, in *Riske v. King Soopers*, the Tenth Circuit Court of Appeals dismissed the plaintiff’s Title VII claim because according to this court, the unpleasantness of the environment was not due to the plaintiff’s gender.¹⁵⁷ In this case, the plaintiff was subjected to an ongoing pattern of increasingly unusual gifts of flowers and rather unusual cards. First, she received an anonymous rose at work on two occasions. Then she received two flowers on Valentine’s Day with a card from “Neena.” Next she received another with a card from “Nina” and a note saying “Being manager is hard, but I hope I look as nice as you when I’m bitching.” The flowers, gifts, and cards continued to escalate, including a letter that read, “I am going to miss you in your tight-ass jeans.” All the while her manager would “stalk” her around the store, whistling at her in a taunting manner.¹⁵⁸ It turns out that the manager and one of his co-workers were sending the flowers and notes to harass the plaintiff. The court found that the plaintiff could not prove that this behavior was based on her gender, yet allowed the case to proceed on an outrageous conduct claim (IIED) (these cases will be discussed in the next section

¹⁵⁶ *Oncale*, 523 U.S. 75, 85 1998.

¹⁵⁷ *Riske v. King Soopers*, 366 F.3d 1085, 1093 (10th Cir. 2004).

¹⁵⁸ *Id.* at 1088.

of this dissertation). It is difficult to imagine that such a series of events would have occurred but for the plaintiff's gender. However, a jury never was afforded the opportunity to make that decision. Instead, judicial interpretation set a high standard of proving that harassing behaviors are based upon a protected status. It appears that not only is the status based-requirement a hurdle that eliminates the majority of incidents of bullying from Title VII's purview, but at least in the 10th Circuit, the burden of showing that conduct was "because of a protected status" creates a fairly heavy burden on plaintiffs to show that the conduct in question was based on a protected status.

However, even for the statuses that are protected, the focus on discrimination versus the focus on dignity can lead to less than desirable results. According to Vicki Shultz, one of the problems with the law of sexual harassment is that "much of what is harmful to women in the workplace is difficult to construe as sexual in design . . . By emphasizing protection of women's sexual selves and sensibilities over and above empowerment as workers, the paradigm permits or even encourages companies to construe the law to prohibit some forms of sexual expression that do not promote gender hierarchy at work."¹⁵⁹ Shultz's statement makes sense, given the legal standard that explicit sexual conduct is by its very nature gender-based.¹⁶⁰ As Ehrenreich has stated "[W]orkplace harassment whether sexual or non-sexual against both women and men is fundamentally a 'dignity harm' against victims' 'dignity and personality interests.'"¹⁶¹ A standard should not focus on the sexual nature of the harassment, but rather on the damage to the targets' dignity. Sexual banter may not damage a target's dignity under certain circumstances, while non-sexual banter or bullying may indeed

¹⁵⁹ As cited by Coleman, *supra* note 16, at 257.

¹⁶⁰ Kleiman et al., *supra* note 129, at 55.

¹⁶¹ Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO L.J. 1 (November 1999). And Rosa Ehrenreich, *Global Perspectives on Workplace Harassment Law: Proceedings of the 2004 Annual Meeting, Association of American Law Schools Section on Labor Relations and Employment Law* 8 EMPL. RTS. & EMPLOY. POL'Y J. 151 (2004).

damage the same target's dignity. Two of the research participants in my study were deeply offended by sexual banter at a restaurant. In fact as a result of this behavior they quit their jobs. However, they were also equally offended by non-sexual bullying behavior at their current employers. It makes little sense that they would have an easier time proving legal liability for the sexual banter when both forms of bullying had the same effect. Further, of the remaining research participants, only one other participant discussed an issue of harassment of a sexual nature, yet all of these participants suffered unacceptable, unnecessary negative outcomes as a result of being targeted by bullies.

Because the law around workplace harassment is so focused on discrimination rather than dignity, it would appear that employers could avoid liability for workplace harassment by assuring that any harassers in their employ make sure to harass all employees. In fact, the 8th Circuit upheld a ruling that made this fairly explicit, accepting as a defense the fact that the abusive behavior was directed at both male and female employees.¹⁶² This standard suggests that the US employment system not only fails to protect the majority of harassment and bullying victims, but also gives employers an incentive to bully all employees to prevent the perception that they are only bullying one class of employees.

Workplace bullying is a harm to the target's dignity, and any measure to address workplace bullying must focus on this harm. Unfortunately, it is clear that protecting worker dignity is not the goal of or at least has not been interpreted as the

¹⁶² See *Hesse v. Avis Rental Car Systems*, 344 F.3d 624, 630 (8th Cir. 2005): "The record shows, however, that Johnson's loud behavior was directed at both male and female employees. Hesse has acknowledged that everyone in the office was subjected to Johnson's deliberate shoe squeaking and that he clapped his hands loudly to get the attention of male garage technicians. Hesse relies on the incident in which Johnson banged on a window to get Sheila Sexauer's attention, but that incident does not establish that Johnson's conduct was based on sex since he engaged in similar behavior to get the attention of male employees"; *and also see* *Holman v. State of Indiana*, 24 F. Supp2d 909 (N.D. Ind. 1998), in which an employer who harassed both husband and wife could not have committed sexual harassment.

goal of the US laws against workplace harassment. This lack of protection of perhaps the most fundamental human right, the right to dignity,¹⁶³ is not the only well-established and recognized human right that is not protected under the US legal system. In fact, the US system of employment laws has never had much of a place for any human rights standard. According to James Gross, “the concept of human rights, particularly workers’ rights as human rights, has never been an important influence in the making of U.S. labor law . . .”¹⁶⁴

Friedman and Whitman also suggest that in “the American conception, ‘harassment’ is a form of discrimination.”¹⁶⁵ Friedman and Whitman’s position is supported by the *Oncale* and *Riske* cases as discussed above, which most clearly focus on the issue of discrimination with little regard to whether the actions stripped the plaintiff of their dignity. Further, according to Friedman and Whitman, this position of the US courts clearly becomes a choice rather than a requirement when one compares this position to that of the European counterparts. According to Friedman and Whitman, when addressing what “evil” the law of harassment looks to combat, the answer in Europe is increasingly “violations of individual dignity.” and there is no reason that the US interpretations could not follow this same path.¹⁶⁶ While legal scholars, such as Rosa Ehrenreich, Friedman, and others, argue that the harm of harassment is to one’s dignity, the focus in the US legal system is still clearly one of discrimination.¹⁶⁷ This difference and the reasons behind this difference will be discussed as avenues for future research in Chapter Eleven of this dissertation. However, for the purposes of gaining insight and defining workplace harassment, this

¹⁶³ Vienna Convention, *supra* note 51.

¹⁶⁴ Gross, *supra* note 68, at 1.

¹⁶⁵ Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241, 241 (Spring 2003).

¹⁶⁶ *Id.* at 242.

¹⁶⁷ See EHRENREICH, *supra* note 161.

shows that the definition of unlawful harassment is not enough to encompass the broader phenomena of workplace bullying. The interpretations of Title VII require that the harassing conduct be based on a protected status, and such conduct must have a discriminatory effect. If the plaintiff fails to prove both of these claims, the conduct will not be remedied under Title VII. Further, according to Anne Marie Marshall, the manner in which the court rulings are implemented in practice by employers tends to limit the rights of the female (or presumably other minority victims) rather than protect them from the discrimination, and therefore may not even adequately protect the 25% of bullying victims who are victimized based on a protected status.¹⁶⁸

Based on my research, many victims of bullying will be left without a remedy due to this protected-status-based standard. In my discussions with the research participants, it was difficult to find a clear-cut example of harassment based on a protected status. For one participant it did appear that her manager was picking on her due to her religion. As a Seventh-Day Adventist, this participant's religion prohibited her working on Saturdays. At one point, the manager, in response to the employee needing Saturdays off due to her religious beliefs, stated, "Well I do not get to miss work every Sunday." Further, a fellow employee, also a Seventh-Day Adventist, was reportedly suing this employer for religious discrimination. Even here, the participant stated she was not sure the actions were due to her religion. She herself suggested she may have been targeted due to her immigrant status or for some other unknown reason. While another research participant suggested that one of the degrading policies of her employer, the requirement to be "Poky-Perfect," might have a greater impact on female wait staff, she did not feel the policy was really discriminatory based on sex. In other circumstances, the research participants pointed out that their bullies were "equal

¹⁶⁸ Anne Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC'Y REV. 83 (March 2005).

opportunity” bullies. Several research participants specifically said that the bully in their workplace treated everyone the same way. In other circumstances the bullies seemed to pick their targets based upon a non-protected status. For instance, the research participant who worked in food services at a rest home was referred to as a “little girl” by her bully. In this case the bully seemed to feel superior due to her older age and seniority level. The target’s young age status is not a protected status under federal law,¹⁶⁹ nor is it protected in the home state of this individual. In another example, the university administrator pointed out that one bully she worked with picked on people who were weak and susceptible to bullying, while the other bullied anybody who needed to be controlled. Another university employee felt that non-tenured faculty, staff, and employees with lower levels of seniority were most likely to be bullied. Finally, the optometrist office manager’s bully bullied everyone, but perhaps continued to bully those who were the weakest and did not stand up for themselves. In any case, for all of these targets of workplace bullying it would be difficult to show that the bullying was based on a protected status.

Finally, a conversation with one research participant also supports the positions of legal scholars Vicki Shultz and Ann Marie Marshall. This research participant had been the target of bullying and sexual harassment at work. However, toward the end of our conversation she stated that in her opinion, women were more often the victims of bullying, but that the bullying did not take the form one would normally expect. She stated that the bullying was not necessarily sexual in nature or even clearly based on gender, but that the bullying might be more subtle. I suggested that perhaps part of the bullying of female employees was forcing them to adopt the typical white male

¹⁶⁹ The Age Discrimination in Employment Act only protects employees from discrimination based on an age status of 40+ years.

patterns of workplace practices, and she readily agreed.¹⁷⁰ This type of bullying is not addressed under any current US employment law, yet it indeed had a profound negative effect on this individual, her dignity, and eventually the organization. This participant stated that the bullying environment affected her at work and at home. She found herself taking her frustrations home with her. Finally, the bullying led to her leaving her employer. She was a valued employee, and this was also a clear detriment to the organization as well.

The details of bullying experiences for 16 research participants reveals that the status-based requirement for legal action in harassment claims leaves many targets of workplace bullying without legal protection. While my experiences support the findings of Namie and Namie that at least three-fourths of incidents of workplace bullying are not based on a protected status, I cannot say definitively as a result of this research that this is the exact proportion. However, what is clear is that for many of the targets who spoke with me in the course of my research, this legal standard left them without legal recourse and left them without protection of their human right to dignity in the workplace.

The severe or pervasive standard

The high standard for proving that actions are “severe or pervasive” conduct applied by many courts creates another gap in coverage of workplace bullying. With 75% of the targets of workplace bullying already excluded from the purview of protection under the EEO laws, the remaining 25% could still be protected under EEO

¹⁷⁰ This statement is perhaps most interesting in contrast to the facts of the Price Waterhouse v. Hopkins case 490 U.S. 228 (1998). In this case, the employer seemed to make the decision to turn down the plaintiff for a partnership based on her being aggressive. The employer allegedly made this decision based on the stereotype that women should not be aggressive, that this aggression was meant for men. I am not sure if this research participant was forced to work in male environment while meeting these same female stereotypes or whether she was expected to adopt male stereotypes in order to succeed.

laws. Unfortunately this is clearly not the case. While Ehrenreich, in defense of her argument for a tort-based approach to addressing sexual harassment, suggests that courts have been more willing to “take a flexible and contextualized view” of sexual harassment, and would thus likely allow broader claims of what constitutes outrageous conduct,¹⁷¹ a review of recent circuit court decisions in the area of sexual harassment suggests otherwise. Not only does there seem to be little concern for the protection of employees’ dignity in the workplace, in many jurisdictions, there seems to be little concern to address anything but the most blatant forms of unlawful harassment.

The level of mistreatment that a plaintiff must prove to be successful seems to have gone past any reasonable standard in far too many cases. For many victims of workplace harassment, even when the harassing conduct is clearly based upon a protected status, the legal hurdle is still too high. Many courts in the US make it very clear that the protection against unlawful harassment is not a protection of civility in the workplace; in fact, in many cases it seems to be no protection at all. Perhaps two paragraphs in Justice Souter’s majority opinion in *Faragher v. Boca Raton* best sum up the Supreme Court’s view of unlawful harassment:

So, in Harris, we explained that in order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive and one that the victim in fact did perceive to be so. 510 US at 21-2. We directed courts to determine whether an environment is sufficiently hostile or abusive by “looking at all the circumstance,” including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance” 510 US at 23. Most recently we explained that Title VII does not prohibit “genuine but innocuous differences in the way men and women routinely interact with members of the same sex and of the opposite sex.” Oncale, 523 US at 81 . . . A recurring point in these opinions is that “simple teasing,” id at 82, offhand comments, and

¹⁷¹ EHRENRICH, *supra* note 161.

*isolated incidents (unless **extremely serious**) will not amount to discriminatory changes in the “terms and conditions of employment.”*

*These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a “general civility code.” Properly applied, they will filter out complaints attacking “the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes and occasional teasing. (Emphasis added)”*¹⁷²

Justice Souter suggests that the Supreme Court’s definitions of hostile environment harassment will lead to assurances that innocent, innocuous work behaviors will not be actionable, that the standard the court has set will “filter out the ordinary tribulations of the workplace.” However, a simple review of just a few cases shows that for too many targets of workplace harassment the reality is that behaviors that most clearly violate their human rights are not actionable in the US legal system because lower courts have taken the interpretation of this language to an extreme level. Further, these decisions are not made by “rogue” judges who lack an understanding of the purpose of the laws against workplace harassment. These cases are often decided by some of the leading appellate court judges. These judges, who seem to have a clear lack of understanding of the realities of the workplace, take these decisions out of the hands of the jury members, who are exposed to this environment of work on a daily basis.¹⁷³

While the Supreme Court seemed to set out a fairly reasonable and straightforward definition of a hostile environment in *Harris* and again in *Faragher*, the interpretation of this language is troubling, to say the least. Some of the most prominent judges in America have made some of the most shocking rulings on workplace harassment. For instance, Judge Posner, in *Baskerville v. Culligan International Co.*, found that “only a woman of Victorian delicacy—a woman

¹⁷² *Faragher v. Boca Raton*, 524 U.S. 775, 788–78 (1998).

¹⁷³ Eric Schnapper, *Some of Them Still Don’t Get It: Hostile Work Environment Litigation in the Lower Courts*, 277 U. CHIC. LEGAL F. 1, 5 (1999).

mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity—would find . . . a gesture intended to simulate masturbation, grunting sounds as she walked by her alleged harasser, and a statement that one public address announcement really meant that all pretty girls run around naked . . . more distressing than the heat and cigarette smoke of which the plaintiff did not complain.”¹⁷⁴ Posner made this determination concerning the female plaintiff’s level of distress despite the fact that a jury had concluded that the actions constituted harassment under Title VII. Not only were these lewd and hostile actions clearly inappropriate in a working environment, Judge Posner’s condescending and degrading language was clearly inappropriate in the courtroom. This case may not even be the most damning for claimants of sexual or other unlawful forms of harassment.

In *Hartsell v. Duplex Products*, the Fourth Circuit agreed with the Western District Court of North Carolina that an environment in which supervisors had informed an employee that they had made every female in the office cry and would also make her cry, called a female sales assistant his slave, pointed out a “buxom” catalog model and asked why they did not have sales assistants like that, referred to the plaintiff’s husband as a “stay at home wife,” and asked the plaintiff, “Why don’t you go home and fetch your husband’s slippers like a good little wife, that’s exactly what my wife is going to do for me,” was not an actionably hostile working environment. Further, this determination was never made by a jury. Instead, the defendants were granted a summary judgment at the lower court level, and the appellate court upheld this decision. In other words, these judges decided not only that this was not actionable harassment, but also that no reasonable jury could find that this was severe and/or pervasive enough to create a hostile working environment.¹⁷⁵ The

¹⁷⁴ *Baskerville v. Culligan Int’l. Co.*, 50 F.3d 428, 431 (7th Cir. 1995).

¹⁷⁵ *Hartsell v. Duplex Products*, 123 F.3d 766 (4th Cir. 1997).

courts in this case clearly went beyond the protection of innocent, innocuous working behaviors. It is difficult to see what place these behaviors and statements had in a working environment. The statements by these supervisors clearly were degrading to the target and did not afford her a reasonable level of esteem or dignity.

Hartsell has been cited favorably by other courts on at least 36 occasions since 1997. In one such case, *Leson v. Ari of Connecticut*, the US District Court for the District of Connecticut cited the *Hartsell* standard in granting a summary judgment for an employer where the plaintiff employee had alleged a male supervisor called the plaintiff “honey” and “sweetie” during training sessions; touched her knees, forearms, head, and shoulders during training sessions; had her engage in a training session where she played the love interest of two men; and when she complained told her that if she were going to be so sensitive she would eventually hit a glass ceiling.¹⁷⁶ The terms honey and sweetie are not terms of esteem when used in the workplace. Touching another person without their permission is an affront to one’s dignity and one’s person, and no employee should have to be subjected to this behavior in order to earn a living. Again, this court went well beyond the protection of innocent working behaviors.

In *Greene v. A. Dui Pyle*, the 4th Circuit Court of Appeals followed the standard the same court had established in *Hartsell* and upheld a summary judgment for a defendant employer where the plaintiff employee had alleged that he had been exposed to material he considered obscene while at work.¹⁷⁷ These materials included adult magazines in the cafeteria and men’s room, and numerous faxes, cartoons, and e-mails that were posted at the time clock. After complaining and being assured that these were inappropriate in the workplace, the plaintiff later found a list of jokes that

¹⁷⁶ *Leson v. ARI of Connecticut, INC.* 51 F. Supp. 2d 135; 1999 U.S. Dist. LEXIS 8226 (April 30, 1999).

¹⁷⁷ *Greene v. A. DUI PYLE, INC.* 170 Fed. Appx. 853; 2006 U.S. App. LEXIS 6873 (4th Cir. 2006).

played on gender stereotypes posted at the time clock. For example, one joke read, “How many men does it take to open a beer? None. It should be opened by the time she brings it.”¹⁷⁸

Plaintiff Greene reported the inappropriate materials to management on at least three occasions. Greene explained that these materials were offensive to him because he was a Christian. The HR manager agreed that the materials were inappropriate and should not be left around for others to see. However, Greene’s supervisor told him that there was nothing wrong with the materials, but he would take care of the problem. However, two weeks later, another employee showed Greene and other employees a picture of a naked woman with a fish and the list of jokes mentioned above. Greene complained, and this time he was fired. Again, Greene’s case was dismissed on summary judgment based on the district court’s finding that these actions were not severe enough to create an unlawful hostile environment. Greene’s own values and beliefs were afforded no weight. Again, employees should not have to choose between a job or exposure to non-work-related material they find to be objectionable and offensive.

In *Lenihan v. Boeing Co.*, the US District Court for the Southern District of Texas cites *Hartsell* and *Baskerville* to find that the allegations by the plaintiff in this case did not constitute enough of the “hellish” environment and did not meet the standard for severe or pervasive as set out in the *Baskerville* and *Hartsell* cases.¹⁷⁹

In short, Lenihan’s allegations are a far cry from the pervasive and intimidating harassment that Title VII targets. “The concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women.” *Baskerville*, 50 F.3d at 430. “Only the most serious sexual harassment can be the basis of a federal suit under Title

¹⁷⁸ *Id.*

¹⁷⁹ *Lenihan v. Boeing Co.*, 994 F. Supp. 776 (S.D. Tex. 1998).

VII.” *Valdez v. Church’s Fried Chicken, Inc.*, 683 F. Supp. 596, 620 (W.D. Tex. 1988).¹⁸⁰

The court here has gone well beyond the protection of innocent behaviors and has established the standard of a “hellish” environment. If the standard was to protect one’s dignity then of course one would be afforded the right to something more than a just-better-than-“hellish” working environment.

Lenihan’s description of her workplace, however, is hardly hellish. Viewed objectively, or subjectively through Lenihan’s deposition testimony, her work environment was not abusive or plagued with demeaning conduct. She admits that none of her superiors or coworkers made any vulgar or sexually offensive comments about women. For example, in her deposition testimony, Lenihan recounted one of Garner’s typical acts of “sexual harassment”:

Earl has described to me—has told me many, many stories [sic] about his daughters and his wife that are very positive, warm mother and child stories, grandmother and child stories in our relationship at work. We’re friends. Okay.

Now Earl—Earl’s family, you know, I don’t mean anything derogatory about his wife or his daughter. I think they’re fine. But Earl’s opinion to me or how it makes me feel is that Earl thinks that’s the way life should be, that women should be at home nurturing their children, you know, keeping their home, that kind of thing.

Similarly, Lenihan described the type of comments made by Hicks that she considers to be sexual harassment:

Every time—almost every time he refers to her [his wife] it’s Little Annie. Little Annie doing this, Little Annie baked cookies, Little Annie went to Randall’s and bought too much cake. You know, he would bring in the leftover cake for us to have at work. It’s just—he acts—he acts like she’s there as his right hand and that she’s there to take care of him and it’s dismissive to me to women for a guy to have an attitude like that about any woman, that that’s what she’s there to do and that’s what he thinks she’s there to do.¹⁸¹

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 792–793.

Plaintiff Lenihan's focus seems to be on whether female employees were afforded the esteem and value they were entitled to in the workplace. She suggested that the harassers in this case were clear in their view that women did not belong in the workplace or, in other words, did not afford women in the workplace the *dignity* to which they are entitled.

Lenihan complains that Garner and Hicks made comments suggesting that women should stay in the home and that Boeing is no place for a woman to work. At deposition, she testified with regard to Garner, "I've had to listen to comments to do with his wife and daughter that I felt like showed his opinion on, that women should stay at home or that it's a good thing for them to be at home, in general. . . ." Further, according to Lenihan, Garner and Hicks ignored her suggestions or ordered her to remain quiet, and Garner did not select her to attend a planning conference within her area of responsibility and competence. Lenihan also alleges that Garner sexually harassed her by failing to invite her to meetings which related to her areas of expertise. She has not detailed the frequency of these purported occurrences or their duration other than to state that Garner walked away while she was talking three or four times a week. Finally, Lenihan contends that Garner reassigned tasks "to other work groups or to male employees within his own group without notifying Lenihan and without any justification for the reassignment."¹⁸²

Despite all of these examples of negative work-related decisions being made based on Lenihan's gender, the court decides that this environment as a matter of law is not a hostile environment. For these judges, unless a plaintiff can show that their working environment is "hellish," they will be unable to prove an actionable hostile environment. The plaintiff, and all female employees working for this supervisor, are left to work in an environment where they are not valued as employees, their input is ignored, and they will most likely be excluded from meaningful training and advancement opportunities and any chance of feeling "worthy, honored or esteemed" at work.¹⁸³

¹⁸² *Id.* at 791.

¹⁸³ MERRIAM-WEBSTER DICTIONARY, *supra* note 58, definition of dignity.

In *Rogers v. City of Chicago*, the Seventh Circuit Court of Appeals again cited to *Baskerville* and this “hellish” standard as the appropriate standard in affirming the district court’s summary judgment. “Not every unpleasant workplace is a hostile environment. The occasional vulgar banter, tinged with sexual innuendo of coarse or boorish workers would be neither pervasive nor offensive enough to be actionable. The workplace that is actionable is the one that is hellish” *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428 (7th Cir. 1994).¹⁸⁴ In this case, plaintiff Rogers, a police officer, complained of the following ten incidents from a commanding officer, Kelenyi:

- (1) a comment by Kelenyi to Rogers that he would “like to be that FOP [Fraternal Order of Police book] in [her] back pocket”;
- (2) when Rogers appeared to be slipping on the stairs, Kelenyi said “don’t fall,” caught hold of Rogers, and then asked Rogers whether she had a boyfriend or needed one;
- (3) a comment by Kelenyi to Rogers and Mark Kelly, one of Rogers’s partners, during an evening check off, when they were turning in their daily reports of activity (that showed high activity), that “you guys are the real police. What are you trying to do, get on the TAC team?”;
- (4) Kelenyi’s interference with Rogers and Kelly’s response to a domestic violence call;
- (5) Kelenyi’s threatening remarks to Rogers and Kelly that he had a problem with the two of them;
- (6) Kelenyi’s remark to Rogers, while exiting a locker room, that “Your breasts look nice in that turtleneck, that red turtleneck”;
- (7) Kelenyi’s frequent appearance on jobs and calls of Rogers even when he was not her assigned Sergeant;
- (8) Kelenyi’s refusal to process, or to turn back, reports prepared by Rogers and Kelly;
- (9) Kelenyi’s ordering Rogers to put a document in a box at the end of the

¹⁸⁴ *Rogers v. City of Chicago*, 320 F.3d 738, 751 (7th Cir. 2003).

room, stating, “Put this in the bin so I can watch you walk over and put it in”; and

(10) Kelenyi’s interference with the work of Rogers and another one of her partners in a robbery case.¹⁸⁵

Again, both the District Court and the Circuit Court of Appeals decided that no reasonable jury could have found that this behavior created a hostile working environment.

Here, the incidents of harassment, which we have delineated in detail above, are no more egregious than the statements and actions that we found in *Baskerville* to be insufficient as a matter of law to constitute an objectively offensive environment. Like the plaintiff in *Baskerville*, Rogers can prove little more than that she encountered a number of offensive comments over a period of several months. Although Rogers, unlike the plaintiff in *Baskerville*, experienced one incident of physical contact when Kelenyi caught her as she appeared to be falling, Rogers herself admits that she looked to be falling when Kelenyi caught her, and she does not argue that Kelenyi’s touching of her was in any way sexual. We thus place little emphasis on this occurrence. Moreover, this case is even less severe than *Baskerville* because *only four of the ten incidents Rogers lists were sexual in nature*. In short, this case is an even stronger candidate for summary judgment than was *Baskerville*, and we affirm summary judgment as to Rogers’s claim for a hostile environment.¹⁸⁶

The allowance of Kelenyi’s behaviors toward Rogers hardly seems to afford an officer of the law the dignity they deserve.

In *Hockman v. Westward Communications*, the 5th Circuit Court of Appeals found that a hostile environment did not exist as a matter of law at Westward Communications under the following conditions.

Hockman claims that soon after she returned to Westward, Rogers began to harass her in the following ways: First, Rogers commented on the body of a former Westward employee, Sheila Ledesma. Specifically, Hockman claims that “[Rogers] would tell her that Sheila Ledesma had a nice behind and body.” Next, Hockman claims that beginning in July of 2001, Rogers would brush up

¹⁸⁵ *Id.* at 750.

¹⁸⁶ *Id.* at 752.

against her breasts and behind. Third, Hockman claims that on one occasion, Rogers “slapped [her] behind with a newspaper.” Fourth, Rogers once attempted to kiss Hockman. Fifth, on more than one occasion, Rogers asked Hockman to come in early so that they could be alone together. Finally, Rogers once stood in the doorway of the ladies’ restroom as Hockman was washing her hands. Rogers stepped aside, however, when Hockman exited the restroom.¹⁸⁷

Again, even taking these facts in the light most favorable to the plaintiff, the 5th Circuit Court of Appeals held that this was not enough for the question of harassment to even get to a jury. No employee should be exposed to the touching, boorish behavior, and attempted sexual touching that occurred in this case. These behaviors have no place in the workplace, have no value in the working environment, and there is no reason that these types of behaviors should not be prohibited.

The standard for legally objectionable behavior in these jurisdictions is an extremely high standard. There are many behaviors that violate workers’ human rights to dignity, esteem, voice, etc. that the judges in these cases have cast aside as trivial or meaningless. These judges clearly have not considered the right to dignity of these plaintiff employees. Instead, their only focus continues to be on the economics of the organizations involved or perhaps, even further, a completely hands-off approach to regulating employers, as so many of these behaviors would have no economic benefit. Employees may not only be stripped of their dignity in a workplace that falls below a “hellish” level, but they may be suffering serious physical, psychological, and emotional consequences. Further, in some cases, the judges themselves readily admit to this high standard. ‘Under Title VII, the standard for establishing that the offending behavior constituted sexual harassment is rather high.’¹⁸⁸

¹⁸⁷ Hockman v. Westward Communication, 407 F.3d 317 (5th Cir. 2004).

¹⁸⁸ Singleton v. Department of Correctional Education; Commonwealth of Virginia, 2004 U.S. App. LEXIS 24059 (4th Cir. 2004). In this case, the 4th Circuit affirmed the district court’s decision that the plaintiff had not met this high standard under the following circumstances—[A]most immediately after she began employment . . . Shinault began sexually harassing her. The offending conduct . . . occurred approximately four times a week from July 2000 to October 2001.” The conduct included: Shinault

When the legal standard for a hostile environment is set so high, as one sees in these cases, it is hard to imagine that Title VII could ever really provide any type of protection for many victims of workplace bullying. In each one of these cases described above, from *Baskerville* to *Westward Communications*, it is hard to imagine that the plaintiffs were not stripped of their dignity and that they did not suffer from some adverse effects, whether these were job-related or not.

While judicial interpretations of the hostile-environment standard seem to brush aside “minor incidents,” it is important to understand that as researchers McCarthy and Mayhew have concluded, “even seemingly minor behaviors can have significant negative effects when they occur frequently and over extended time periods.”¹⁸⁹ Further, while judges seem to focus on only severe and direct actions, “research indicates that most hostile behavior at work is indirect, passive and verbal in nature.”¹⁹⁰ In other words, judges, in deciding whether harassment is severe and/or pervasive enough to rise to the level of an actionable claim, are often looking for behaviors that are much different from many of the types of workplace bullying that can be so damaging to the targets of these behaviors. Even if one is concerned only with discrimination in the workplace and not dignity, workplace incivility and low-level harassment may indeed be the “new” form of discrimination in today’s workplace.¹⁹¹ To eliminate these behaviors from coverage may render Title VII and other EEO laws useless in the battle against workplace harassment and bullying.

telling the plaintiff’s supervisor that he should spank plaintiff everyday, Shinault staring at plaintiff’s breasts whenever he spoke to her, measuring the length of her skirt for compliance with the prison dress code and then stating the skirt “looked real good,” talking about what good shape Shinault himself was in for his age, Shinault asked the plaintiff if he made her nervous, was named her supervisor even though he worked under a different government agency, and installed a security camera to watch her at her desk “for safety” reasons even though the only place she had contact with prisoners was in the library and there were no security cameras in that location.

¹⁸⁹ MCCARTHY & MAYHEW, *supra* note 22, at 83.

¹⁹⁰ Paula L. Grubb et al., *Symposium: Introduction to the Symposium on Workplace Bullying: Workplace Bullying: What Organizations are Saying*, 8 EMPL. RTS. & EMPLOY. POL’Y J. 407, 410. (2004).

¹⁹¹ Cortina, *supra* note 109.

One research participant shared a very interesting thought on the level of severity of her bullying. She related to me that she felt guilty in even complaining about the bullying behavior, due to what outsiders might think. In particular, she stated that her co-worker leaning over the conference table, pointing his finger and talking to her in a mean voice, might not seem like much or might seem “minor” to someone else looking in from the outside, but to her it is not minor. The same could probably be said for every one of the plaintiffs’ complaints that were so easily minimized by these judges from above, in many cases in complete opposition to the determinations made by a jury of the plaintiffs’ peers. As a researcher, I do not think it is really my position, any more than it is the position of these individual judges at any level, including the Supreme Court, to decide what creates a hostile environment. First, I would suggest that if the plaintiff truly subjectively believes that the environment is hostile, then his or her dignity has been violated and this should be enough. However, if one requires that some objective reasonable-person standard be met, then I would think that a group of reasonable people that work under similar circumstances should make these decisions. During two of the three focus groups, this specific question was addressed. Participants were asked who should establish the standard for what rises to the level of workplace bullying. The general consensus was that it made little sense for this decision to be made by employers, bullies, or even judges. Rather, the most often stated method for establishing the standard and the generally agreed-upon standard in these two focus groups was that in some way the method would have to be collaborative and that employees and targets of workplace bullying would definitely need to be a part of that process.

This standard established by the focus groups seems very similar to the jury system. In this system, a plaintiff gets to explain why they think they have been bullied. The employer then, of course, would get his/her chance to argue why specific

actions were not bullying, and then both sides would be assessed by a jury of peers that will most likely include individuals with working experience and also quite likely with managerial or supervisory experience, rather than by a judge who has been in the position of being a king of their courtroom and who most likely rarely, if ever, experiences bullying from the position of the target.

I would argue that if these groups of individuals disagree with the decisions of a judge or even a small panel of judges, then the judges are the ones who are out of the norm and thus not reasonable. Perhaps it should be juries that should decide how one defines a “reasonable judge” rather than judges deciding a “reasonable jury.” Again, turning to Merriam Webster, reasonable means “being within the bounds of reason, not extreme.”¹⁹² To test just how extreme these judicial decisions were, I presented the facts of 6 of these cases to students in an advanced undergraduate employment law course and students in an MBA human resources management course. The students, with no more information than the facts of the Baskerville, Hartsell, Leson, Green, and Hockman cases as described by these judges, and included above, concluded as follows:

- Baskerville: 20 out of 22 Employment law and 13 out of 16 MBA students felt these actions created a legally actionable hostile working environment;
- Hartsell: 20 out of 22 and 13 out of 16 MBA students felt that the facts of this case were indeed unlawful harassment;
- Leson: 21 out of 22 Employment Law and 15 out of 16 MBA students believed that the plaintiff in this case should have prevailed on the claim of unlawful harassment;

¹⁹² MERRIAM-WEBSTER, *supra* note 58.

- Green: 21 out of 22 Employment Law and 14 out of 16 MBA students felt that Green had a claim for a hostile working environment;
- Hockman: 21 out of 22 Employment Law and 15 out of 16 MBA students believed that Westward Communications should be liable for the hostile working environment.

Based upon these results in every case, if a jury were to consist of these college-educated business students, the jury would be “unreasonable” according to the judges in these cases. According to these judge-made decisions, no reasonable jury could have found these actions to be severe and pervasive enough to create a sustainable legal action. However, the vast majority of these students found that these actions did indeed constitute unlawful harassment. Just as the students in this survey did, the judges deciding these cases imparted their own belief on what constitutes a hostile environment into their decisions. These judges hold rare positions of prestige and power, and for the most part come from rather prestigious and powerful working backgrounds. The students’ backgrounds were varied, from first-generation college students, to blue-collar workers, retail workers, and professional employees. The question here is “who is reasonable?”

Gap created by the required outcome of job effect

In *Meritor Savings Bank v. Vinson*, the Supreme Court held that “unwelcome sexual advances and other forms of hostile environments may create an abusive working environment and thus create actionable discrimination under Title VII of the Civil Rights Act.”¹⁹³ While this same standard was applied by the Supreme Court in *Harris*,¹⁹⁴ both Justice O’Connor’s majority opinion and Ginsburg’s concurrence

¹⁹³ *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

¹⁹⁴ *Harris v. Forklift*, 510 U.S. 17 (1993).

began to place more focus on the showing of additional work-related outcomes separate from the hostile environment itself. O'Connor explicitly pointed to the fact that an abusive environment may "detract from an employee's job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."¹⁹⁵ Ginsburg concurred that

the adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment." *Davis v. Monsanto Chemical Co.*, 858 F.2d 345, 349 (CA6 1988). It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to "make it more difficult to do the job."¹⁹⁶

However, the work harm in question was first established under the *Meritor* ruling, where the Court stated that for sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."¹⁹⁷ So while the language in *Meritor* could reasonably be interpreted to mean that the abusive environment created by the bullying or harassment alters the working conditions and thus fulfills the required showing of harm, other courts seem to place much more emphasis on the job performance language.

Again looking at the Fifth Circuit's decision in *Hockman*, the court applied an extremely stringent requirement of showing not only a job effect but a rather severe job effect.

To survive summary judgment, the harassment must be "so severe and pervasive that it **destroys** a protected class member's **opportunity to succeed** in the work." *Shepherd*, 168 F.3d at 874. The alleged conduct must be more

¹⁹⁵ *Id.* at 20.

¹⁹⁶ *Id.* at 25.

¹⁹⁷ *Meritor*, at 57.

than rude or offensive comments, teasing, or isolated incidents. *Id.* Moreover, “implicit or explicit in the sexual content [of the harassment] [must be] the message that the plaintiff is incompetent because of her sex.” *Butler*, 161 F.3d at 270.¹⁹⁸

Thus, according to the Fifth Circuit, a plaintiff must prove more than a hostile working environment that unreasonably interferes with the working environment; such hostility must “destroy” any chance to succeed and must also at least suggest that the plaintiff is incompetent due to his/her gender, race, age, or other protected status. This standard suggests that anyone who has succeeded at work despite the hostile environment would not have an actionable claim. This language was cited again by the Fifth Circuit in 2005 in *Williams v. the US Dept. of the Navy*¹⁹⁹ and in 2007 in *Jordan v. Memorial Hermann Southeast Hospital*,²⁰⁰ in both cases to support a summary judgment against a plaintiff. In total, the language from this one headnote from the *Hockman* case has been cited 38 times.

The effects of workplace bullying may be seen in the job. However, the effects are also seen outside of work. In a study by Mikkelsen and Einarsen, 73.6% of targets reported bullying led to diminished relationships with friends and family and diminished leisure, household, and sexual activities. However, unless these targets could also show a job effect, they would not have an actionable claim under Title VII if the *Hockman* standard were applied.

For all of the research participants in my research, the bullying did make their jobs tougher, thus meeting the standard as set out by the earliest Supreme Court decisions. However, the higher standards and the more direct job measures of later federal court decisions were not always met. Many of the research participants have been very successful in their positions, despite the bullying. The optical worker

¹⁹⁸ *Hockman v. Westward Communication*, 407 F.3d 317, 326 (5th Cir. 2004).

¹⁹⁹ *Williams v. the U.S. Dept of the Navy*, 149 Fed. Appx. 264 (5th Cir. 2005).

²⁰⁰ *Jordan v. Memorial Hermann Southeast Hospital*, 2007 U.S. Dist. LEXIS 91013 (S.D. Tex. 2007).

managed the office for ten years under these bullying conditions. The food service worker was called back by her supervisor, and he pleaded with her to return to work when she quit as a result of the bullying incident. The “Poky-Perfect” waitress must indeed be pretty perfect, as she has the longest tenure of any employee at her restaurant. The university administrator and the faculty members all had received recognition and rewards at various times for their service to the university. If these employees were working in the Fifth Circuit, even if they could show that the bullying was due to a protected status, their work success would defeat any chance for their claim to be successful. The tangible outcomes of workplace bullying vary from target to target. This specific requirement that the opportunity to succeed be destroyed prevents many targets of workplace bullying from being protected at all.

Gap created by the notice requirement and the unwanted standard

A third potential gap that was explored in some detail earlier as part of the process of defining workplace bullying is the interpretation of “unwanted” in the context of workplace harassment. Related to this showing of “unwantedness” is the requirement for the plaintiff to show that he/she has taken specific steps to report the harassing behavior. In the *Faragher* and *Ellerth* rulings, the Supreme Court laid out a two-pronged employer affirmative defense for unlawful supervisory harassment that did not lead to a tangible adverse job effect.²⁰¹ Under this standard, an employer can defend against liability if they could show that “the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”²⁰²

²⁰¹ *Faragher v. Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

²⁰² *Faragher*, at 807.

Many lower courts have interpreted this standard as placing a high burden on targets of workplace harassment to follow their employer's reporting guidelines. Given the earlier interpretations of employer liability, the court decisions that use this standard to further limit employer liability are misinterpreting this two-pronged defense. In *Faragher*, the Court was not looking to immunize employers from liability for harassment of which the employer had actual knowledge—"We held that neither the existence of a company grievance procedure nor the absence of actual notice of harassment on the part of upper management would be dispositive of such claim, while either might be relevant to liability, neither would result in employer immunity."²⁰³ Further under the Code of Federal Regulations, employers are liable for co-worker harassment "where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show it took immediate and appropriate corrective action."²⁰⁴ It would seem counterintuitive that the *Faragher* and *Ellerth* rulings were meant to make employers less likely to be liable for supervisory harassment than they are for co-worker harassment. In some federal court decisions, however, this is the interpretation of *Faragher*.

The EEOC Enforcement Guidance on Employer Liability for Supervisor Harassment also establishes a reasonable reporting requirement for targets of workplace harassment. The Guidance states: "An employer's complaint procedure should be designed to encourage victims to come forward. To that end, it should clearly explain the process and ensure there are no unreasonable obstacles to complaint. A complaint procedure should not be rigid . . . when an employee complains to management about alleged harassment, the employer is obligated to investigate the allegation regardless of whether it conforms to a particular format . . .

²⁰³ *Id.* at 792.

²⁰⁴ Sexual Harassment 29 C.F.R. §1604.11(d) (1999).

Moreover reasonable care in preventing and correcting harassment requires an employer to instruct all supervisors to report complaints of harassment to appropriate officials.”²⁰⁵

Under these guidelines the requirements for the victims of harassment to report are reasonable. In fact, the burden is on the employer to assure that the employer’s reporting system promotes reporting of incidents of harassment. The reporting requirement for the target is straightforward. First, if the employer knows or should have known of the harassment, there is no reporting requirement. Second, if there is a reporting requirement, the reporting system must be such that any barriers to reporting are removed, and the system must be flexible. If this standard were actually applied, there would not be a gap in coverage due to the reporting requirements under the US harassment laws.

However, the EEOC compliance guidance is not the law, and while the Supreme Court’s decision established law, courts still must interpret this law on a case-by-case basis. The actual law in practice is more readily applied through the lower courts’ interpretations of the Supreme Court ruling, and often these interpretations are much more unreasonable. For instance, the Eleventh Circuit seems to have established a fairly bright-line standard that employees must use the reporting system as designated by the employer or the employer will succeed in the *Faragher* defense. In *Minix v. Jen-Welden*, the court made it clear that plaintiff employees must show that they followed the reporting requirements as laid out by their employers:

[W]e said in *Madray v. Publix Supermarkets, Inc.* that once an anti-harassment policy has been effectively disseminated to an employer’s employees “it is incumbent upon the employees to utilize the procedural mechanisms established by the company specifically to address the problems and grievances.” 208 F.3d 1290, 1298-99 (11th Cir. 2000) (citation omitted). We

²⁰⁵ EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors 915.002 (1999).

concluded in *Madray* that the employer did not have actual notice of sexual harassment because the aggrieved employee brought her complaints “to individuals *not designated* by [the employer] *to receive or process sexual harassment complaints*.” *Id.* (emphasis added). In this case, when Thornton complained about Fetner to Mendoza—who, again, was not her immediate supervisor and did not hold a management position mentioned in the anti-harassment policy—she, like the employee in *Madray*, complained to an individual “not designated [by Jeld-Wen to receive or process sexual harassment complaints].” *Id.* Accordingly, we conclude that Thornton’s complaint to Mendoza did not put Jeld-Wen on actual notice of Fetner’s sexual harassment, and the company cannot be held directly liable on that ground.²⁰⁶

For this court it did not matter if the plaintiff notified an agent of the employer or even if the employer had actual knowledge or should have known of the harassment. Instead, plaintiffs would only be able to prevail if they followed the reporting structure established by the employer. A target of bullying is often reluctant to report the behavior at all. The fact that the plaintiff in this case reported the harassment to any member of management was a courageous step that should have been enough to meet the plaintiff’s burden. However, this interpretation of a target’s reporting requirement instead creates another gap in coverage of the US harassment laws in protecting victims of bullying and harassment in the workplace.

The reality is that the decision to report harassment and bullying in the workplace under the best of circumstances is a difficult decision. For many targets it may take time to build up the courage to report incidents. However, even when targets find the courage to report, even a seemingly short delay in reporting the harassment might be considered an unreasonable delay according to the standard of the Eleventh Circuit Court. In *Walton v. Johnson*, this court seems to turn much of the burden for reporting and assuring that the harassment is remedied back onto the plaintiff employee.

²⁰⁶ *Minix v. Jeld-Wen, Inc.*, 237 Fed. Appx 578, 582 (11th Cir. 2007).

In the court below, Ortho argued that Walton unreasonably failed to take advantage of the employer's anti-harassment policy by failing to report the alleged harassment, which began in mid-June of 1999, until September 3 of that same year. Walton responded in three ways. First, she claimed that she advised her supervisor that his advances were unwelcome. Second, she argued that she waited a mere five days after the last act of harassment to file a complaint and that there was, therefore, no unreasonable delay. Finally, she claimed that to the extent there was a delay in reporting the alleged harassment, that delay was reasonable because (a) she feared that she would not get the hospital representative position Mykytiuk had discussed with her, (b) she feared that she might lose her current job given Mykytiuk's purported connections to upper management, and (c) she feared for her safety after Mykytiuk showed her his gun while she was in his apartment.

The district court correctly rejected these arguments. The fact that Walton advised her supervisor that his advances were unwelcome is relevant, of course, but she did not argue in the district court that, based on these warnings, she had reason to believe that the advances would stop, particularly after those warnings had already proven to be unsuccessful.²⁰⁷

Here the court has placed an additional burden on the targets of workplace harassment. Even if the target has confronted their harasser, they now must be able to show they had good reason to expect the harassment would stop, even where the harasser is in a supervisory position. However, this does not fully state the burden the court places on the target. Instead, the court goes further to explain that indeed the burden is on the targeted employee to end the hostile environment:

We are mindful of the fact that severe harassment such as that which is alleged to have occurred here can be particularly traumatic. As we have pointed out before, however, "the problem of workplace discrimination . . . cannot be [corrected] without the cooperation of the victims." *Madray*, 208 F.3d at 1302 (alteration in original) (quoting *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1366 (11th Cir. 1999)). Thus, the victim of the alleged harassment has an obligation to use reasonable care to avoid harm where possible. *See Faragher*, 524 U.S. at 807, 118 S. Ct. at 2292 ("If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable

²⁰⁷ *Walton v. Johnson and Johnson Services, Inc.* 347 F.3d 1272, 1289–1291 (11th Cir. 2003).

employer should reward a plaintiff for what her own efforts could have avoided.”)²⁰⁸

While recognizing the intimidating nature of being harassed, the court still places the responsibility for bringing the harassment to an end back on the victim.

Reporting sexually offensive conduct by a supervisor would for many or most employees be uncomfortable, scary or both. But because this will often or ordinarily be true, as the Supreme Court certainly knew, its regime necessarily requires the employee in normal circumstances to make this painful effort *if the employee wants to impose vicarious liability on the employer and collect damages under Title VII*. *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 35 (1st Cir. 2003). Here, Walton could have avoided most, if not all, of the actionable harassment by reporting Mykytiuk’s behavior to Ortho officials. By failing to do so, Walton did not give Ortho an opportunity to address the situation and prevent further harm from occurring.²⁰⁹

This burden would only be abandoned where the victim could show a “credible threat of retaliation.”

Subjective fears of reprisal may exist in every case, but, as we discussed *supra*, those fears, standing alone, do not excuse an employee’s failure to report a supervisor’s harassment. Here, Mykytiuk never told Walton that her job was in jeopardy, nor did he threaten her with physical harm. We therefore conclude that Walton did not reasonably avail herself of the protections afforded by Ortho’s anti-harassment policies, and the district court thus correctly held that Ortho was entitled to the *Faragher* defense as a matter of law.²¹⁰

Not only did the plaintiff in this case report the harassing conduct within just five days after the last incident, but she had reported the incident earlier to members of management.²¹¹ Still, the court in this case found the plaintiff to be unreasonable in failing to report, even going as far as to suggest that targets of harassment must contribute to the harassment in order for it to even occur. The court, while recognizing

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at note 15.

the fear that exists for targets, minimizes this fear and difficulty in reporting these actions and expects targets to overcome this fear with little or no hesitation. The very nature of bullying is a method of instilling fear and controlling employee behavior. This would include and often does include instilling a fear to even report the bullying itself and a fear to report any other problems an employee may have with the management of their organization. As discussed earlier, one of the very themes of workplace bullying that emerged from my research is that bullying is a method of silencing the voices of targets and their fellow employees.

For the research participants, the faculty member was bullied by being taken off committees when he brought up issues of concern about the finances of the university. This seems to have been an example of bullying to get the employee to “shut-up.” My own experiences as a target of workplace bullying were also clearly in response to lodging legitimate complaints to the leadership at this university. The former soldier’s commanding officer clearly withheld privileges to get the soldier to stop lodging legitimate complaints. However, once again, it appears that a few judges isolated from the normal working environment have failed to consider the realities of bullying and harassment. These judges suggest targets will be able to freely complain about the attempts by bullies that may very well be targeted to silence their targets.

In *Hockman*, the 5th Circuit hit a “tri-fecta,” not only setting out a heightened standard for severity and an unreasonable expectation of a job effect, but also in questioning the efficacy of the method by which a target reports harassing behavior:

On October 11, 2001, Hockman and her coworker, Harvill, told their supervisor, French, that they had been harassed by Rogers. The parties dispute what happened next. Hockman claims that she did not go to French before October of 2001 because she was embarrassed. However, Hockman discussed Rogers’s behavior with Harvill and McDonald before approaching French. Both women allegedly told Hockman that they had also been harassed by Rogers. According to Hockman, she and Harvill told French that Rogers had touched them inappropriately, and Hockman told French that Rogers had once

tried to kiss her. In response, French asked Hockman how she wanted the situation handled. Hockman claims that she responded that she was not sure what French was supposed to do in this situation, that she was sure there was a formal procedure for handling such complaints, and that French should take action in compliance with that procedure. Hockman claims that French then directed her to a sexual harassment policy that was purportedly for a previous company named Howard and Bluebonnet and was not in effect for Westward during the relevant time period. Hockman claims that to her knowledge, French never acted on her complaint; Hockman re-approached French once or twice, but French again asked Hockman what she was supposed to do about the situation.²¹²

In *Hockman*, the plaintiff took numerous measures to report the harassment, but in this case, the court has decided that the employer's failure to respond to these complaints insulates them from liability. This failure of the supervisor, in the court's opinion, should have been enough for the plaintiff to take further steps (which of course the plaintiff must have by bringing the lawsuit against Westward).

According to Namie and Namie, reporting to HR, co-workers, or the bully's boss is much more likely to have a negative impact on the target than a positive effect.²¹³ Further, targets of bullying often feel shame and fear that prevents them from reporting the actions. This, of course, in no way means the targets want the action. However, under the many federal courts' interpretations of both the unwanted requirement for protected-status-based harassment to be actionable and the interpretation of the Faragher defense, a failure to report and even to report via a specific avenue may lead the court to dismiss the plaintiff's case.

In my conversations with the targets of workplace bullying, the failure to report the bullying was a common theme. Thirteen out of the sixteen research participants suggested that at least in some of their experiences there was no reason to report the bullying because nothing would be done. In two of the situations, the bully was the owner of the business. In six of the situations, the target pointed to examples

²¹² *Hockman v. Westward Communication*, 407 F.3d 317, 321–322 (5th Cir. 2004).

²¹³ NAMIE & NAMIE, *supra* note 1, at 281.

where other incidents had been reported to their employer and nothing had been done. One of the participants suggested that filing a grievance with her employer would be “career suicide.” Fear of reprisal for reporting (either direct or indirect reprisal) was mentioned by twelve of the research participants. Several of the participants pointed to very specific past incidents that led to these conclusions. Two of the participants had reported incidents in the past and nothing positive came from these reports. Three others had suggested they saw specific incidents reported by others and either the outcome was nothing, or the situation became worse after incidents were reported. Two faculty members suggested that their complaints on any subject often led to unfavorable committee assignments. Incidents also went unreported as targets felt they should not complain. One participant felt that she did not deserve to file a complaint. In fact, she claimed that she felt ashamed to be complaining at all, even during our conversations. She felt that perhaps this behavior was just part of work and that others were much worse off. Two participants felt that they should not complain about the sexually tinged discussions in a restaurant because that was just the way things were and the other employees did not mind. However, all of these targets felt that something should have been done about the bullying they endured. They all wanted to have some avenue of redress that they felt was otherwise unavailable.

The standard set by at least some of the federal courts seems to ignore the reality of the difficulty targets will have in reporting harassment and bullying. Further, these standards ignore the reality that an employer may receive notice of harassing behavior in ways other than a report through a formal system. The fact that so many victims fail to report harassing behavior through employer systems should suggest to the courts that these systems have failed. These employer systems would seem to have unreasonably failed to detect and thus remedy the workplace harassment that exists and therefore are unreasonable and should fail the first prong of the Faragher defense.

However, the fact that at least in the cases referred to above, judges have made the determination that the targets have failed to self-remedy this workplace harassment creates another gap between the US law around workplace harassment and the necessary legal protections to address workplace bullying.

Title VII is not an anti-bullying piece of legislation

Title VII simply does not protect the targets of workplace bullying. The status-based requirement of Title VII and other EEO laws eliminates three-fourths of the targets of bullying from legal protection.²¹⁴ For the remaining 25% of targets, who have an actionable harassment claim, proving the protected-status basis may be difficult at best. Even if targets jump this hurdle, they still face an uphill battle to prove their case given the heightened standard of anything from showing that the bullying conduct created a “hellish” environment to showing that the harassment completely destroyed any chance for the target to be successful on the job. Further, courts have given control to employers to require employees to jump through very specific hoops to report the behavior. By the time each of these hurdles is met, it is difficult to imagine that many bullying victims, if any, would have a cognizable claim under Title VII.

In two of the focus groups, we discussed the difference between workplace bullying and harassment. During these focus groups I wrote each term on a dry-erase board and asked the group to share their thoughts and definitions of each term. Initially the group felt there was a clear difference, but none of the participants were able to describe the difference. As one participant would suggest a possible difference or provide a defining characteristic of harassment, others would describe why this could also describe bullying. As we progressed through this discussion, the similarities

²¹⁴ *Id.*

between the behaviors were much greater than the differences, and the group eventually decided that harassment was a subset of bullying. However, at the same time, the group concluded they believed that harassment was unduly afforded a higher status and protection than other forms of workplace bullying. The group agreed that the outcomes of harassment and bullying could indeed be the same. The group also agreed that despite the fact that the outcomes can be the same, the remedies for workplace harassment are much greater. One individual explained that if he felt his experiences were based on his race, gender, or some other protected status he would have reported the incident or gone to an attorney. Other participants agreed. Finally, all of the participants concluded that remedies for all forms of workplace bullying should be available based on the outcomes to the targets, not the basis for the bullying behavior. However, it is clear that Title VII and other EEO protections against workplace harassment only cover a very small subset of workplace bullying.

US Common Law

While the interpretation of workplace harassment under Title VII of the Civil Rights Act, the ADEA, and the ADA does not provide an adequate remedy to workplace bullying, the protections under US common law likewise offer little hope for the targets of workplace abuse. I will explore several areas of common law, beginning with the tort of outrage or infliction of emotional distress, which is the tort most directly related to workplace bullying.

Intentional Infliction of Emotional Distress

According to the Restatement of Torts 2nd § 46, “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the

other results from it, for such bodily harm.”²¹⁵ A simple review of the elements in this definition of the claim of outrage, or intentional infliction of emotional distress (IIED) claims, indicates a clear gap in the abuse that is covered under this standard and the typical abuse of workplace bullying. Many types of devastating bullying and abusive work behaviors are not prohibited under this common-law standard, and in fact only the most extreme and obvious cases of workplace bullying would be covered.

First, the level of conduct that the target must prove is too high to address many instances of bullying. As I have already shown, even in the case of unlawful harassment, where there is no requirement that the harassing behavior be “outrageous,” the level of conduct that a plaintiff must prove to have an actionable claim can be extremely high and leaves many targets of bullying without a claim. Second, an IIED claim by its very definition requires a showing of intent. As I discussed in defining workplace bullying in Chapter Five, intent should not be an element of the definition of workplace bullying. Further, determining intent places an unfair burden on the target to prove what only the bully knows for sure. Even the alternative requirement of showing recklessness focuses on the behavior rather than the outcomes of such behavior and would not address a great deal of the bullying that occurs in the workplace. The third element of severe emotional distress also is likely to exclude many targets of bullying. Again turning to the analysis of the law around workplace harassment above, even where there is not a requirement to show any type of severe emotional distress, many courts have required plaintiffs to show an extremely high level of harm, thus leaving many targets of bullying uncompensated. Finally, an additional problem exists with the remedy. Even if the target of bullying is able to show that such bullying is outrageous conduct, that the conduct was intentional or reckless, and that it led to severe emotional distress, the employer may not be found

²¹⁵ RESTATEMENT (SECOND) OF TORTS § 46 (1965).

vicariously liable for the actions. I will explore each of these gaps in greater detail below.

The gap created by the need to show extreme or outrageous conduct

In West Virginia, my home state and the state in which I practice law and where I undertook this research, the elements for an intentional or reckless infliction of emotional distress were set out in *Travis v. Alcon*.²¹⁶ In this case the WV Supreme Court ruled that “the first element of the cause of action is a showing by the plaintiff that the defendant’s actions towards the plaintiff were atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency. The defendant’s conduct must be more than unreasonable, unkind or unfair; it must truly offend community notions of acceptable conduct.”²¹⁷ The court went on to quote from the Restatement of Torts to explain this level of outrageous conduct:

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by “malice,” or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, “Outrageous!”

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one’s feelings are hurt. There must still be freedom to

²¹⁶ *Travis v. Alcon*, 202 W.Va. 369 (1998).

²¹⁷ *Id.* at 369, 375.

express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.²¹⁸

The Third Circuit Court of Appeals, a neighboring jurisdiction, suggested in *Cox v. Keystone Carbon Co.*, “[I]t is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress.”²¹⁹ In contrast, it has already been shown in numerous studies that bullying in the workplace is not rare. What might be rare would be finding a successful claim of IIED by a target of workplace bullying.

As indicated by many of the research participants in this study, workplace bullying often takes the form of managerial decisions and employment practices. However, at least in the 9th Circuit, managerial practices would not ever rise to this required showing of extreme and outrageous conduct. Under California law, “[a] simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, *even if improper motivation is alleged*.”²²⁰ The removal of the faculty members from committees, the failure to provide training opportunities, the seat checks, dress codes, etc., all would be personnel management activity and would thus not support a claim for IIED. Bullying in general, as discussed earlier, may itself be a management technique used to limit dissent.

The conduct a plaintiff must prove for an IIED claim is much more severe than the conduct required in a sexual harassment claim.²²¹ Given the fact that the standard

²¹⁸ *Id.* at 375–376.

²¹⁹ *Cox v. Keystone Carbon Co.*, 861 F.2d 390, 395 (3d Cir. 1988).

²²⁰ *Metoyer v. Chassman*, 101 Fair Empl. Prac. Cas. (BNA) 1017 (9th Cir. 2007).

²²¹ For a discussion of this see *Glover v. Oppleman* at 642: Claims of intentional infliction for emotional distress have survived motions for summary judgment in sexual harassment cases. See, e.g., *Speight v. Albano Cleaners, Inc.*, 21 F. Supp. 2d 560 (E.D. Va. 1998) (putting hand under employee’s skirt and attempting to grab her buttocks, and separate attempt to grab her breast was sufficient outrageous conduct). However, all other precedents cited by the parties have involved denials of relief in these kinds of cases. *Dwyer v. Smith*, 867 F.2d 184, 194–195 (4th Cir. 1989) (sexual comments, accusations of sexual relations with employees, and placing of pornography in plaintiff’s mailbox not sufficiently

in many unlawful harassment cases has gone well beyond the realm of behavior that violates the employee's right to dignity and thus fits within my definition of workplace bullying, the standard for IIED claims is even further astray and thus does not adequately protect the targets of workplace bullying.

Because bullying has become so common, it is conceivable that judges would never consider bullying to be "outrageous" or conduct that would "shock the conscience." As several of the research participants stated, the behavior they described as mistreatment or even bullying in the workplace, they also described as just being "part of work." In two cases, research participants working in the food industry simply accepted even sexually harassing behavior as just "part of the job." They simply left one restaurant where the atmosphere was particularly hostile. They stated there was "nothing they could do" and that was "just the way things were" and it was "easier to just leave." In neither case were they shocked or outraged by the yelling in the kitchen or the sexual banter and harassment. In so many of the examples given by the research participants their bullies seemed to use managerial practices. For the university professor, the "changing" of committee assignments could be viewed as a managerial decision; for the university administrator, much of the bullying could be interpreted as managerial decision-making style. Another university employee stated that from the outside, her colleagues' finger-pointing and leaning over the table might not seem like much, but to her it was. Would someone from the outside look at this as meeting that standard of outrageous conduct?

outrageous); *Paroline v. Unisys Corp.*, 879 F.2d 100, 112 (4th Cir. 1989) (supervisor's course of sexually suggestive remarks and touching, and one instance of groping in an automobile not sufficiently outrageous); *aff'd in part, rev'd in non-relevant part*, 900 F.2d 27 (4th Cir. 1990); *Webb v. Baxter Healthcare Corp.*, 57 F.3d 1067 (4th Cir. 1995) (unpublished), opinion at 1995 U.S. App. LEXIS 14534, 1995 WL 352485 (4th Cir. 1995) (gender- and ethnic-based ridicule of a sales representative concerning the weakness and unfitness of women in the workplace, unfair criticism and defamation concerning dress, tardiness, behavior with clients, and the plaintiff's sanity, as well as a comment that "You Jews are all alike" was not considered "utterly intolerable in a civilized society"); *Burke v. AT&T Technical Services Co., Inc.*, 55 F. Supp. 2d 432, 441 (E.D. Va. 1999) (stating that the "great majority of discrimination cases . . . will not meet this demanding standard").

The gap created by the element of intent or recklessness

Even if the target of workplace bullying is able to convince a jury, and perhaps more importantly, judges at the trial court and appellate level, that the bullying at work was outrageous, there are still several elements of this type of claim that make his/her success unlikely. Again, turning to the West Virginia Supreme Court,

[T]he second element that a plaintiff must show is that the defendant acted with an intent to inflict emotional distress upon the plaintiff, or acted in a reckless manner such that it was certain or substantially certain that emotional distress would result from the defendant's actions. Comment (i) to § 46 of the *Restatement of Torts (Second)* states:

The rule stated in this Section applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct. It also applies where he acts recklessly, . . . in deliberate disregard of a high degree of probability that the emotional distress will follow.

Whether a defendant has acted intentionally or recklessly in inflicting emotional distress is usually a question of fact for the jury.²²²

Again, this is a very high standard. In my discussion with the research participants, many of the participants mentioned they believed a negative intent on the part of their bully. For instance, the office manager stated the optometrist liked to be mean. Several of the participants from the university stated the university president intended to bully to force his agenda. However, rarely did they state that the employer or bully intended to harm them. The targets tended to assume there was an intent to intimidate or control. This seems very reasonable considering that the dictionary definition of bullying mentioned above does indeed include “to intimidate.” For another, there seemed to be the intent to force them out of the workplace. Some did mention that “they wanted to humiliate me,” or “make me feel bad,” but never did the words “they wanted to cause severe emotional distress” cross the lips of any of the

²²² Travis v. Alcon, 202 W.Va. 369, 378–379 (1998).

research participants. Further, nowhere in the written narratives did a research participant include as an element of their definition of workplace bullying the intent to cause severe emotional distress.

The gap created by the requirement to prove severe emotional distress

While the effects of workplace bullying may indeed be devastating to the targets, these effects may not always rise to the level of severe emotional distress and may seldom meet this requirement under the legal definitions of IIED. As can be seen under Davenport's analysis cited in Chapter One, bullying, if it persists, goes through an escalation of effect.²²³ However, to sustain a claim under the tort of outrage or IIED, a plaintiff must show a third element of an IIED claim—severe emotional distress. Again, returning to the WV Supreme Court's interpretation of this element,

The plaintiff must show that the defendant's extreme and outrageous conduct caused the plaintiff to suffer severe emotional distress . . . The requirement of causation is satisfied by showing a "logical sequence of cause and effect" between the actions of the defendant and the plaintiff's injury. *Long v. City of Weirton*, 158 W. Va. 741, 761, 214 S.E.2d 832, 848 (1975). When the defendant's conduct is "extreme and outrageous . . . it is more likely that the severe emotional distress suffered by the victim was actually caused by the perpetrator's misconduct rather than by another source." *Hakkila v. Hakkila*, 112 N.M. 172, 812 P.2d 1320, 1324 (N.M.App. 1991).

Expert testimony is not required in every case to prove the causation element for intentional infliction of emotional distress.²²⁴

Other jurisdictions do not follow this same rule and may indeed require expert testimony. For instance, the Pennsylvania Supreme Court has ruled that the plaintiff's own testimony regarding his/her severe emotional distress is not enough proof to meet his/her burden of proving this element of the claim.²²⁵ While this requirement does not

²²³ See Chapter One.

²²⁴ *Travis v. Alcon*, 202 W.Va. 369, 379 (1998).

²²⁵ *Kazatsky v. King David Mem'l Park, Inc.*, 515 Pa. 183, 527 A.2d 988, 995 (Pa. 1987).

exist in every state,²²⁶ it does at a minimum eliminate all Pennsylvania employees from an IIED claim unless they can present medical testimony.

Further, if a case survives the first two elements of an IIED claim (intent and severe/outrageous behavior), the level of emotional distress that will have to be shown is still in question. For instance, in *Love v. Georgia Pacific Corporation*, the Supreme Court of West Virginia mentioned that emotional distress may not be enough to sustain a claim even when there is expert testimony and the plaintiff is receiving treatment.

The evidence offered by Appellant regarding the emotional stress that she suffered as a result of the retaliatory conduct of her former employer was minimal. Her treating physician, Dr. Thomas, testified that the symptoms with which Appellant presented to him “were not the symptoms of severe emotional distress” and that he prescribed for her “the lowest dose . . . [he] could use” of an antidepressant. When questioned as to the dosage amount of the antidepressant, e.g. one tablet per day, Appellant was unable to recall the amount of medication she had taken.²²⁷

This standard suggests that perhaps the courts are looking for some type of severe emotional breakdown in order to sustain a claim for IIED. The Western District Court of Virginia made it very clear that claims of IIED will most often fail because the harm is not severe enough.

Claims for intentional infliction of emotional distress also usually fail because the harm alleged is not sufficiently severe. In *Russo*, it was not enough for the plaintiff to have pled that she “was nervous, could not sleep, experienced stress and ‘its physical symptoms,’ withdrew from activities, and was unable to concentrate at work.” 400 S.E.2d at 163. In *Collins*, it was not enough for the plaintiff to have “experienced nightmares, sleeplessness, nervousness, inability to concentrate, fear and anxiety” . . . In *Webb*, the Fourth Circuit assumed for purposes of argument that diagnoses of major depression, post traumatic stress disorder, and the need to take prescription drugs for sleeplessness and thyroid

²²⁶ For instance, the 8th Circuit recently decided that Missouri law did not require medical evidence of the severe emotional distress. 8th Circuit Rules Medical Testimony Unnecessary to Prove Emotional Distress 4-2 MEALEY’S LITIG. REP. EMPLOY. L. 6 (September 2007).

²²⁷ *Love v. Georgia Pacific Corp*, 209 W.Va. 515, 516 (2001).

problems were sufficient allegations of harm. 1995 U.S. App. LEXIS 14534, 1995 WL 352485.²²⁸

It is difficult to find one of my research participants who experienced the level of emotional distress that would meet this high standard. None of the research participants were seeing a therapist as a result of being bullied, and none were on antidepressants as a result, not even at the lowest dose. The university administrator talked about losing hair, and sleeplessness. Several talked about taking work home with them. One research participant said it stayed with her for a long time because she did not have someone at home to vent to, as her mother had been able to vent over dinner when she was growing up. One participant said he took a lot of anger home with him for a short time until he decided to fight back against his bully. One research participant related his experiences of being bullied in school to workplace bullying. For him, the bullying in school led him to be unsure of himself, lowered his esteem, and made him timid. However, once he grew to well over 6 feet tall, he was able to turn the table on his school-place tormentors and stood up for himself. For the other research participants, nobody specifically pointed to any greater level of emotional distress. However, employees are morally entitled to more than a working environment that does not lead to a debilitating level of emotional distress. All of the research participants had some effect from the bullying behavior or the mistreatment at work. Most of the participants felt that the behaviors did not afford them their dignity and that the behaviors either impacted their own esteem or likely would have negatively affected the esteem of other employees who were less self-confident.

It is possible that many of the targets in my research were in the early stages of Davenport's progression and may have indeed suffered more intense emotional distress as time passed. These participants may have sought medical assistance at

²²⁸ Glover v. Oppleman, 178 F. Supp. 2d 622, 642 (W.D. Va. 2001).

some point. However, other participants who had been exposed to their bullying for long periods of time often found solace in taking self-help steps. For instance, one university employee became active in two union movements, and also directly confronted his harasser. The optical company worker likewise confronted her bullying boss, as did the university administrator. Another university faculty member's coping mechanism was, in essence, to brush off the importance of work and spend as much time as possible at his own company. However, other participants did not really see a way to address their workplace bullying. Perhaps they were simply lucky enough to move on before they suffered from the severe emotional distress they would be required to show in order to gain any type of relief under an IIED claim. However, an employee should not have to endure what could be irreversible harm before these acts should be addressed. However, this section of this dissertation is still focused on insight rather than the process of eliminating workplace harassment. In terms of the remedy of IIED, a simple review of the element of this claim clearly provides the insight that these claims are ineffective remedies for workplace bullying.

Problem with lack of employer liability

As mentioned earlier, my goal is not to establish a windfall for victims of workplace bullying. The goal is to eliminate bullying from the American workplace. However, the reality is that in order to deter workplace bullying, employers must experience consequences for allowing these behaviors to occur. Further, when targets are harmed by workplace bullying, they should be, at the least, made whole. The typical legal remedy to effectuate a deterrent and to make a plaintiff whole is cash compensation. Unfortunately, even if the target has been able to show that the behavior in question "shocks the conscience," that the actor intended to cause harm or recklessly cause harm, and the harm was a severe level of emotional distress, they still

may not be able to collect any form of compensation because employers will not be held liable for these acts. The employer may be only vicariously liable where the actions are done in the furtherance of the employer's interest²²⁹ or, under a second standard, the employer will be liable only if the actions are done within the scope of their employment.²³⁰ Further, in many circumstances, employers will be liable only under the state workers' compensation laws. In West Virginia, claims outside of workers' compensation for negligent infliction of emotional distress are barred by Code Section 23-2-6 of the West Virginia Worker's Compensation Act. Likewise, in California, most claims of emotional distress in the employment context are also barred by the exclusive remedy provision of the state workers' compensation act.²³¹

Courts may not accept bullying as potential evidence of outrageous conduct

David Yamada performed an extensive review of IIED claims in 2000. At that time and again in 2004 he concluded, as I have here, that the tort of IIED is ineffective in combating workplace bullying.²³² However, in March 2005, there was some hope for the IIED claim as a potential tool to combat workplace bullying. The jury in *Raess v. Doesher* awarded \$325,000 to a clinical perfusionist who had been bullied by a cardiac surgeon. However, the Indiana Court of Appeals overturned this jury decision,

²²⁹ For instance see *Liadis v. Sears, Roebuck & Co.* 47 Fed. Appx. 295 (6th Cir. 2002).

²³⁰ This is the standard applied in West Virginia and has been interpreted rather broadly: Generally, the course and scope of employment includes any conduct by an officer, agent, or employee in the furtherance of the employer's business. We have generally accepted the proposition that an employer may be liable for the conduct of an employee, even if the specific conduct is unauthorized or contrary to express orders, so long as the employee is acting within his general authority and for the benefit of the employer. For example, in *Nees v. Julian Goldman Stores, Inc.*, 106 W. Va. 502, 146 S.E. 61 (1928) . . . We stated that: A master may not limit his liability to such of the conduct of his servant as is discreet and within the bounds of propriety, and avoid liability as to such conduct as is indiscreet and improper. Where a master sends forth an agent he is responsible for the acts of his agent within the apparent scope of his authority, though the agent oversteps the strict line of his duty. *Travis v. Alcon*, 30-31.

²³¹ *Shoemaker v. Myers*, 52 Cal.3d 1, 276 Cal. Rptr. 303, 801 P.2d 1054 (Cal. 1990). See also *Bracke v. County of L.A.*, 60 Fed. Appx. 120, 2003 U.S. App. LEXIS 4204 (9th Cir. 2003) (summary judgment appropriate in emotional distress action where the parties were not plaintiff's employers and his exclusive remedy was the workers' compensation act).

²³² Yamada (2000, 2004), *supra* note 2.

finding that testimony that Dr. Raess was a workplace bully had no probative value in an IIED case, and that the prejudicial value of this testimony was enough to render the jury's verdict ineffective. So reluctant to even consider a cause of action for a target of workplace bullying, the Indiana Court of Appeals found that not allowing the following jury instruction requested by the defense was reversible error:

“Workplace bullying” is not an issue in this matter, nor is there any basis in the law for a claim of “workplace bullying.”

In other words, you are not to determine whether or not the Defendant, Daniel Raess was a “workplace bully.” The issues are as I have instructed you: whether the defendant assaulted the Plaintiff Joseph Doescher on November 2, 2001, and whether that assault constituted intentional infliction of emotional distress.²³³

If other courts adopt this same view, then IIED claims are indeed ineffective against workplace bullying. These instructions that the appeals court suggests needed to be used in order for the case to stand up on appeal suggest that bullying can never amount to IIED.

Other Potential Tort Remedies

Another potential tort remedy to explore could be a breach of contract claim. Vanderstat raises breach of contract as a potentially interesting legal argument that may protect employees but at the same time may lead employers to be skeptical to take voluntary measures. Vanderstat argues that like an employee manual, which may be a legally enforceable contract, a workplace anti-bullying policy may also form a binding contract.²³⁴ Therefore, if the practice of having a broad-based harassment

²³³ Raess v. Doescher 861 N.E.2d 1216 (Indiana Court of Appeals, 2007). This appeal was reversed by the Indiana Supreme Court on procedural grounds in Raess v. Doescher 883 N.E.2d 790 (2008) because defendant's counsel failed to raise an adequate objection to this testimony during trial.

²³⁴ Eliza Vanderstat, *Symposium: Introduction to the Symposium on Workplace Bullying: Workplace Bullying in the Healthcare Professions*, 8 EMPL. RTS. & EMPLOY. POL'Y J. 455, 469 (2004).

policy becomes widely accepted or utilized, then these policies could be interpreted as part of the employment contract. However, employers already take many steps to avoid any interpretation of employee manuals as being contracts. This same reaction to workplace harassment policies would be expected, and these disclaimers on these policies may indeed weaken the effectiveness of such policies.

Coleman suggests that universities are more likely to have broad-based anti-harassment policies or anti-bullying policies.²³⁵ However, in this case, several of my research participants were indeed from a university setting, and I also worked at this same university setting at the time. In this case, there was absolutely no attempt to address workplace bullying. In fact, the EEO officer was very clear that the harassment policy was meant to meet the legal requirements and nothing more. In fact, because I opposed this position, I actually lost one of my roles as a legal consultant in this organization. Further, none of the research participants mentioned that their employers had an anti-bullying policy. This lack of coverage is further confirmed by Namie and Namie, who suggest that “few companies have human resources policies to address harassment in addition to the discriminatory variety.”²³⁶ So while a breach of contract claim should always be explored by a plaintiff’s attorney by reviewing a target employer’s policies and handbooks, clearly this claim is not enough to protect all victims of workplace bullying.

According to Coleman, while torts such as assault, defamation, invasion of the right to privacy, etc. may theoretically be potential remedies for workplace harassment, “as a practical matter they are almost entirely unavailable as legal remedies for mobbing victims except in the most egregious of circumstances.”²³⁷

²³⁵ Coleman, *supra* note 16, at 254.

²³⁶ Gary Namie & Ruth Namie, *Workplace Bullying: How to Address America’s Silent Epidemic*, 8 EMPL. RTS. & EMPLOY. POL’Y J. 315, 317 (2004).

²³⁷ Coleman, *supra* note 16, at 251.

Administrative Remedies

Administrative remedies such as workers' compensation and unemployment compensation are likewise inadequate remedies for targets of workplace bullying. Workers' compensation is an ineffective method of dealing with workplace bullying for several reasons. First, even if the target of workplace bullying is successful in obtaining worker's compensation, the remedy is very limited. State workers' compensation laws also exist to deal with work-related injuries and illnesses. Namie and Namie suggest that the effects on targets of bullying should be labeled an injury.²³⁸ Perhaps this is because workplace injuries are more easily accepted as worker's compensation claims. However, even for successful claims, the nature of a worker's compensation claim makes this a rather ineffective remedy. Worker's compensation claims are most often limited to a portion of lost wages (2/3 is the most common standard).²³⁹ According to Coleman, this is not enough to have any real deterrent or punitive effect for the bully or for the organization that allows the bullying to occur.²⁴⁰

Unemployment compensation is an equally inadequate remedy for targets of workplace bullying. First, even this limited remedy is often unavailable to the target of bullying who quits his/her job to avoid the bullying behavior. To receive unemployment compensation, the target must prove that the quitting was a constructive discharge. As mentioned in Chapter Two of this dissertation, one of my first clients had such a case. She had been forced to quit because she was fearful of a physical attack by her supervisor. This client had been yelled and screamed at by her supervisor, who was 30 years her junior, more than a foot taller than she, and more than twice her weight. His defense was that this was common practice in the restaurant

²³⁸ Namie & Namie, *supra* note 1.

²³⁹ WALSH, *supra* note 94, Ch. 15, at 461.

²⁴⁰ Coleman, *supra* note 16.

industry, and the administrative law judge agreed. One of the research participants also addressed unemployment compensation. She stated that many employees would quit due to the owner's bullying behavior and would then file for unemployment compensation benefits. The employer, an optometrist, would contest every claim. In this employee's ten years of service with the employer, the employer never lost an unemployment hearing. Even if the target wins this claim, the remedy is weak. The compensation is a partial replacement of one's wages and is limited to 26 weeks.

Conclusion on Tort and Administrative Remedies

There is little legal protection for the victims of workplace bullying in the United States. Even for the victim of bullying that is based on a protected status, cases such as *Hartsell* and *Baskerville* show that the alleged harassing behaviors will have to be quite severe to be actionable. For other targets the situation is even less hopeful. While there are potential victories under IIED claims, this standard is extremely difficult to meet and clearly, taken as a whole, will do little to eliminate workplace bullying. Further, as one can see in the *Doescher* case, claims of workplace bullying are not only likely to be unsuccessful, but even mentioning these words as part of a claim will be viewed negatively by the courts. In the case of the 16 research participants who engaged in the interviews, not a single target turned to an attorney. None of the targets felt they had any legal remedy. Based on the above legal analysis, they were most likely correct in their assessment. This is not because their incidents were not serious. The participants in this study suffered greatly at the hands of their bullies. Many left careers and/or jobs prematurely. Many of their personal lives suffered. In all cases, their human right to be treated with dignity was clearly violated. Despite these outcomes, there is little reason to believe any of these targets of workplace bullying had any legal recourse available to them.

CHAPTER NINE:
INSIGHT SECTION FOUR: INSIGHTS INTO WHAT HAS BEEN DONE TO
ADDRESS BULLYING OUTSIDE OF THE UNITED STATES

While the analysis in Chapter Eight suggests that in the United States, victims of workplace bullying have little or no legal protection, a comparative and international review suggests that targets in other jurisdictions do have more effective legal remedies. In countries such as the United Kingdom and Germany, workplace bullying is addressed either through the common law or through already existing statutes. Others countries, such as Sweden, France, and the Canadian province of Quebec, have adopted specific statutes to address the problem. Further, in many countries around the world there is a presumption of employment for cause or for a term that may protect targets of workplace harassment. Therefore, unlike under the US doctrine of employment at will, employees cannot be fired for any reason. In these situations a finding of constructive discharge as a result of bullying could also be an unjust dismissal. Many different countries have implemented different systems to address workplace bullying, and several of these will be discussed below. Countries such as Sweden and France have established specific legislation, while others such as the United Kingdom, Australia, and Canada have taken different legal approaches.

Sweden

Much of the initial research on workplace bullying was undertaken in Sweden, so it makes sense that Sweden would also be the first country to pass a law to protect targets of workplace bullying. [I]n 1993, the Swedish National Board of Occupational Safety and Health adopted an *Ordinance Concerning Victimisation at Work*. The ordinance contains provisions and measures against victimization at work and a

general recommendation on the implementation of the provisions. The ordinance defines victimization as “recurrent and reprehensible or distinctly negative actions which are directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community.”²⁴¹ The ordinance characterizes victimization as forms of behavior such as “adult bullying, mental violence, social rejection and harassment—including sexual harassment.” Under its provisions, employers are obligated to institute measures to prevent victimization and to act responsively if “signs of victimization become apparent, including providing prompt assistance to targets of abusive behavior.”²⁴²

The Swedish law is very comprehensive. The law addresses potential reasons for workplace bullying:

The background to victimization can, for example, be shortcomings in the organization of work, the internal information system or the direction of work, excessive or insufficient workload or level of demands, shortcomings of the employer’s personnel policy or in the employer’s attitude or response to the employees.

Unsolved, persistent organizational problems cause powerful and negative mental strain in working groups. The group’s stress tolerance diminishes and this can cause a “scapegoat mentality” and trigger acts of rejection against individual employees.²⁴³

The Swedish law also is very explicit in placing the burden on eliminating bullying with the employer:

Section 2

The employer should plan and organize work so as to prevent victimization as far as possible.

²⁴¹ DAVENPORT ET AL., *supra* note 9, Introduction, at 26.

²⁴² Yamada (2004), *supra* note 2, at 512.

²⁴³ Ordinance of the Swedish National Board of Occupational Safety and Health containing provisions against Victimization at work AFS 1993:17.

Section 3

The employer shall make clear that victimization cannot be accepted in the activities.

Routines**Section 4**

In the activities there shall be routines for the early detection of signs of, and the rectification of such unsatisfactory working conditions, problems of work organization or deficiencies of co-operation as can provide a basis for victimization.

Section 5

If signs of Victimization become apparent, counter-measures shall without delay be taken and followed up. In doing so, a special investigation shall be made to ascertain whether the causes of shortcomings of co-operation are to be found in the way in which work is organized.

Section 6

Employees who are subjected to victimization shall quickly be given help or support. The employer shall have special routines for this.²⁴⁴

The act, in addition to defining victimization, gives examples that include personal forms of bullying as well as organizational forms.

The following are some instances of victimization:

- Slandering or maligning an employee and his/her family.
- Deliberately withholding work-related information or supplying incorrect information of this kind.
- Deliberately sabotaging or impeding the performance of work.
- Obviously insulting ostracism, boycott or disregard of the employee.
- Persecution in various forms, threats and the inspiration of fear, degradation, eg sexual harassment.

²⁴⁴ *Id.*

- Deliberate insults, hypercritical or negative response or attitudes (ridicule, unfriendliness etc).
- Supervision of the employee without his/her knowledge and with harmful intent.
- Offensive “administrative penal sanctions” which are suddenly directed against an individual employee without any objective cause, explanations or efforts at jointly solving any underlying problems. The sanctions may, for example, take the form of groundless withdrawal of an office or duties, unexplained transfers or overtime requirements, manifest obstruction in the processing of applications for training, leave of absence and suchlike.

Offensive administrative sanctions are, by definition, deliberately carried out in such a way that they can be taken as a profound personal insult or as an abusive power and are liable to cause high, prolonged stress or other abnormal and hazardous mental strains on the individual.²⁴⁵

The Swedish law presents a number of interesting issues. First, the Swedish law has gone much further to protect targets of bullying than any American law. The Swedish law is also status-neutral. There is no concern with whether the bullying is based on a protected status. Instead, all forms of bullying, no matter the reason, are unlawful. Further, many of the actions prohibited under the Swedish ordinance would seem to be accepted managerial practices in the United States. Specifically, many of the systems of monitoring employees may fall under the provision of “supervision of the employee without his/her knowledge” As mentioned earlier, it is becoming more and more common for American employers to use electronic monitoring of employee workstations, and self-managed work teams (SMWTs) may be utilized as examples of stealth monitoring of employees. The law also addresses many of the factors that have been found to lead to bullying in prior research and that have been identified as bullying in the narratives and interviews from research participants in this

²⁴⁵ Ordinance of the Swedish National Board of Occupational Safety and Health containing provisions against Victimisation at work AFS 1993:17.

study. Further, the Swedish law also places the burden on the employers to eliminate this hazard to employees in the workplace.

However, Swedish law, based on the definitional analysis of workplace bullying earlier in this dissertation, leaves some potential holes for bullying to occur within the law. For example, in defining victimization, the law reads that the behavior must be “recurrent.” There are many examples of behavior that may be bullying and may strip the target of their dignity that do not have to be recurrent. Even in the US definition of unlawful harassment there is a weighing of the combination of severity and pervasiveness. While the Swedish law does cover isolated incidents, the fact that the recurrent requirement is used in the definition of the law is of concern and may lead to skepticism of single incidents. However, the most important insight provided by this Swedish law is that workplace bullying can indeed be addressed through employment laws. Even if this law is flawed, it is a much stronger protection for targets of workplace bullying than anything in the US legal system.

The majority of the research participants’ experiences in my study would be covered by the Swedish law. The removal of the faculty members from the committees and the suspension of the hotel worker would seem to fit squarely under the excessive administrative sanctions. The CSA’s behavior would most definitely fall under excessive monitoring. Many of the research participants’ responses would fit under the intentional insulting behavior and the hypercritical or negative responses and the inspiration of fear prohibited under this act. Further, the targets of workplace bullying in my study as well as all potential targets would be protected by the requirement of a much more aggressive response by employers to eliminate and prevent workplace bullying.

France

France has also responded to workplace bullying through a statutory response. However, even before the passage of a specific statute, the concept of moral harassment has been mentioned in French court decisions since the 1960s.²⁴⁶ In the late 1990s, French psychologist Hirgiroyen published a book on “moral harassment,” which helped to provide the terminology of the phenomena, which the French courts adopted.²⁴⁷ The French labor movement also played an important role in establishing the French response to workplace bullying. In March 2000 employees at Eclatec went on strike to demand that the president of the board of directors leave. The employees of Eclatec had accused the president of moral harassment.²⁴⁸ The combined forces of the French courts and the public awareness led to strong French legislation addressing bullying. On January 17, 2002, France’s Social Modernization Law (*loi de modernisation sociale*) accomplished this task with the introduction of Articles L. 122-49 through L. 122-54 to the Labor Code and Article 222-33-2 to the Penal Code.²⁴⁹ As a result, “moral harassment” is a violation of both the nation’s labor and criminal codes. “The Labor Code now provides that no employee shall suffer repeated actions which have the purpose of causing a deterioration in working conditions by impairing the employee’s rights and dignity, affecting employee’s physical or mental health, or compromising the employee’s professional future.”²⁵⁰ Offending parties can face fines and imprisonment under these codes.²⁵¹

While the French law on moral harassment covers status-blind bullying, from the perspective of ending workplace bullying there are still a number of problems with

²⁴⁶ Maria Isabel S. Guerrero, *The Development of Moral Harassment (or Mobbing) Law in Sweden and France as a Step Towards EU Legislation*, 27 BC INT’L & COMP. L. REV. 477, 488 (2004).

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 490–491.

²⁴⁹ *Id.* at 492.

²⁵⁰ Yamada (2004), *supra* note 2, at 512.

²⁵¹ *Id.*

this law. First, at least in the letter of the law, there is an emphasis on the repetitive nature of the bullying acts. Second, much like the American interpretation of unlawful harassment, the French law focuses on work outcomes as evidence of moral harassment. However, the law defines moral harassment very broadly and leaves a great deal of room for interpretation, and the law, at least partially, focuses on the outcomes to employees' rights to dignity in the workplace. Again, this law would most likely cover many of the actions described by the research participants. The most concerning issue from this standpoint would be the interpretation of the repetitive requirement of this law. If the interpretation is that harassment simply needs to have occurred more than once, then in almost all of the cases, the research respondents were targets of bullying on a repeated basis. However, if one looks only at the repetitiveness of specific acts, many of the research participants would not be protected under this act due to the fact that, as was described earlier, bullies tended to use different tactics at different times to intimidate or attempt to intimidate the targets. Despite these potential problems, the fact that such a law was adopted shows that it is feasible to craft a legislative response to workplace bullying.

The United Kingdom

The legal system in the United Kingdom addresses workplace bullying in a different manner than Sweden and France. Workplace bullying in the UK has been addressed through the common law and through collective bargaining. While the current remedies for bullying in the UK are common law responses and collective bargaining, the UK has also come close to adopting legislation to directly address workplace bullying.

Like the French labor unions, unions in the UK have also played an active role in pushing for a legal response to workplace bullying. UNISON, the largest union in

the UK, has taken an active approach to dealing with workplace bullying by commissioning a number of studies on the issue.²⁵² MSF, another UK union, was instrumental in the push for the introduction of the “Dignity at Work Bill.” This bill was not introduced, but did raise awareness of the problem of workplace bullying and is credited as leading employers to implement “dignity at work” and “anti-harassment” policies.²⁵³

In addition to the work done by labor unions, the UK is an example of how general unjust dismissal laws in a legal system can provide a remedy for targets of workplace bullying where the American doctrine of employment at will does not. According to Yamada, “there is a line of employment tribunal and court decisions” under the unjust dismissal provisions of the Employment Rights Act of 1996, “where employees have claimed that they were constructively dismissed at least in part by being subjected to severe bullying.”²⁵⁴ Yamada cites to two cases as evidence of the efficacy of this law. In *Ezekial v. The Court Service*, dismissal of an employee who engaged in bullying was found to be a fair dismissal.²⁵⁵ In *Stone v. Lancaster Chamber of Commerce*, the plaintiff prevailed on a claim that she had been bullied out of her job and that this was thus an unjust dismissal. Constructive dismissal has been found in other, similar cases of bullying in the UK.²⁵⁶ The unjust dismissal rulings protect targets of workplace bullying by affording employers the legal right to terminate an employee for bullying another and also by affording the target a claim for unjust dismissal if they are forced to quit as a result of their bully’s behavior.

²⁵² Michael Sheehan et al., *Applying Strategies for Dealing with Workplace Bullying*, 20 MANPOWER 50 (1999).

²⁵³ *Id.*

²⁵⁴ Yamada (2004), *supra* note 2, at 513.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

Employers may also be liable for the psychological injuries to targets of workplace bullying in the UK. In *Hatton v. Sutherland*, [2002] EWCA Civ 76 (Court of Appeal Civil Division, Feb. 2002) the court determined that employers are indeed liable for psychological injuries that occur at work under the same standard as any other injury.²⁵⁷ In *Pakenham-Walsh v Connell Residential and another*, [2006] EWCA Civ 90, (Court of Appeal—Civil Division, 21 Feb. 2006), Judge Geddes dismissed a claim for damages by an employee against her employer for psychological injuries. However, even in this case, the judge agreed that *Hatton v. Sutherland* was the applicable legal standard, but did not feel that the injury to the plaintiff in this case was reasonably foreseeable.²⁵⁸ An employer would be liable for the outcomes of workplace bullying in a situation where such risk was found to be reasonably foreseeable.

Further, the UK's Protection from Harassment Act of 1997 provides yet another avenue of protection for the targets of workplace bullying. While this act was not initially passed to protect targets from workplace bullying, the language of the act suggests that harassment of any form, including workplace bullying, would be unlawful. Under this act, any person is prohibited from engaging in conduct that amounts to harassment of another.²⁵⁹ In 2005, the law was successfully used to litigate a claim on behalf of an employee who had been bullied at work, and it was held that an employer could indeed be vicariously liable under this act.²⁶⁰

²⁵⁷ *Hatton v. Sutherland*, [2002] EWCA Civ 76, (Court of Appeal Civil Division, Feb. 2002).

²⁵⁸ *Pakenham-Walsh v. Connell Residential (Private unlimited company) and another*, [2006] EWCA Civ 90, (Court of Appeal—Civil Division, 21 Feb. 2006).

²⁵⁹ UK Protection from Harassment Act of 1997 *CHAPTER 40* Butterworth's UK Statutes Copyright 2007, Butterworth's Tolley *CHAPTER 40* [21 March 1997] **Protection from Harassment Act 1997**, Ch. 40, s. 1 (Eng.)

²⁶⁰ *Majrowski v. Guy's and St Thomas's NHS Trust*, House of Lords, [2006] UKHL 34, [2007] 1 AC 224, 12 July 2006, ©2003 MAJROWSKI v GUY'S AND ST THOMAS'S NHS TRUST, Court of Appeal, [2005] EWCA Civ 251, [2005] ICR 977, [2005] IRLR 340, [2005] QB 848, 16 March 2005. When a boss turns into a bully, Clare Dyer, *The Guardian*, March 29, 2005.

Common law rulings in the UK have proven to provide much greater protection to targets of workplace bullying than the laws in the US. Other countries analyzed in this section aside from the United States also have similar unjust dismissal laws regarding termination of employment. So perhaps the interpretations by the British courts will provide direction for those countries that have not directly addressed workplace bullying under their termination of employment laws.

The protections for targets of workplace bullying in the UK, like those provided in Sweden and France, are much more effective than those in the United States. The legal response in the United Kingdom also presents an additional method to address workplace bullying. By providing protection from unjust dismissal, the UK legal system has provided targeted employees a potential remedy through a claim of constructive discharge. Such a claim would have provided protection to many of the research participants in my study who felt they needed to leave their jobs as a result of the bullying.

Canada

The employment law of Canada provides an example of combining statutory and common law to remedy workplace bullying. Employment law in Canada is mostly a provincial matter.²⁶¹ However, “employment is not at-will in Canada. Rather, the common law of employment in Canada starts with the presumption, that absent just cause (which is interpreted restrictively in favor of employees), an employment contract can only be terminated upon reasonable notice or pay in lieu of reasonable notice.”²⁶² This provides the possibility that workplace bullying could be addressed as a form of constructive discharge and thus unjust dismissal. Much like the UK, the

²⁶¹ Parkes, *supra* note 13, at 428.

²⁶² *Id.*

presumption of employment for term or cause in Canada makes constructive discharge a relevant tort in the battle against workplace bullying. In both *Shah v. Xerox Canada* and *Whitting v. Winnipeg River Brokenhead Community Futures Development Corp.*, plaintiff employees were successful in proving constructive dismissal based on workplace bullying.²⁶³ Of course it is important to note that under this type of action, the prevailing plaintiff is then entitled to the same damages as for any type of unjust dismissal.²⁶⁴ Canadian plaintiffs have also experienced some success in tort suits for intentional or negligent infliction of nervous shock and have directly recovered for the damages from bullying.²⁶⁵

Canadian discrimination law is also more expansive than US law in that sexual orientation is a protected status in the laws in every province. Family status, marital status, criminal conviction, and political belief are protected in the legislation in some provinces.²⁶⁶ Therefore, more claims of bullying would be considered unlawful harassment under the Canadian laws.

Perhaps the biggest difference between the Canadian and US laws on workplace bullying exists in Quebec. In Quebec, the protection against workplace bullying goes beyond the common law. Quebec has adopted the first North American law banning workplace bullying. Under Section 81.19 of the Revised Statutes of Quebec, “Every employee has a right to a work environment free from psychological harassment, and every employer must take reasonable action to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it.”²⁶⁷ Under this statute, psychological harassment is defined as “any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments,

²⁶³ *Id.* at 430.

²⁶⁴ *Id.* at 43.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 429.

²⁶⁷ Revised Statutes of Quebec Section 81.19.

actions or gestures that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee. A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment."²⁶⁸

For employees in the Province of Quebec who are covered by a collective bargaining agreement, this statute is automatically considered part of such agreement and would be addressed under the terms of the CBA. Other employees have the right to file a complaint with the Commission de la fonction publique within 90 days of the last event of psychological harassment. This commission will attempt to mediate the claim. If no agreement is reached through mediation, the case will then be referred to the Commission des relations du travail. At this stage, several remedies are available, including reinstatement, back pay, and punitive and moral damages. Employers may also be ordered to take measures to assure that the workplace is free of psychological harassment.²⁶⁹

Clearly, the laws of Canada do much more to address workplace bullying than those of the US. Even under the common law of Canada, an employee who is forced out of his/her employment due to bullying in the workplace would have a claim for unjust dismissal. For residents and workers in the Province of Quebec the avenue for relief is even clearer. These employees are covered by a fairly comprehensive statute that directly addresses workplace bullying. Targets of workplace bullying in Quebec have avenues to redress bullying in front of the provinces labor commission, and plaintiffs are provided a labor attorney at this commission.

Both the common law tort of unjust dismissal and the Quebec statute on psychological harassment would provide much better opportunity to remedy

²⁶⁸ *Id.*

²⁶⁹ *Id.*

workplace bullying than any of the legal protections in the United States. Again, many of my research participants would have a potential claim for constructive discharge under the Canadian laws, as several have either already been forced out of their profession or are contemplating changing employers due to their bullying experiences. Further, while some of the experiences of the research participants may fall out of the bounds of this statute due to the requirement of repetitive nature or heightened severity of a single incident, the statute would at least provide all of the participants an opportunity to have their concerns addressed and would also provide an opportunity for the participants to approach their employers for relief. Again, while this law may not be perfect, it does suggest that workplace bullying can indeed at least partially be addressed through statute.

Other Responses to Workplace Bullying

Responses to workplace bullying are not limited to these countries. According to Coleman, South Africa will most likely accept a code of conduct, which will address workplace bullying, as part of the Employment Equity Act.²⁷⁰ In Germany, the prohibition of workplace bullying has been found to fit into their general jurisprudence system.²⁷¹ In Europe many governments have taken at least some measures against bullying. In Spain a criminal case was heard in 2002 for humiliation at work, and debate has been ongoing to implement legislation prohibiting bullying or mobbing.²⁷² Belgium instituted anti-workplace bullying legislation in 2001, and Ireland instituted a task force to study the issue in that same year.²⁷³

²⁷⁰ Coleman, *supra* note 16, at 264.

²⁷¹ *Id.* at 263.

²⁷² *Id.* at 262.

²⁷³ *Id.* at 261 & 263.

Like the UK, Australia has not addressed workplace bullying through specific legislation. However, the government of Queensland has been active in investigating workplace bullying. In 2001, the Queensland government formed a task force to study workplace bullying. This task force recommended adding workplace harassment as an actionable claim under the Australian Industrial Relations Act.²⁷⁴ Further, Queensland's government has addressed workplace bullying under health and safety laws by issuing pamphlets explaining legal recourse for bullying victims, and the Supreme Court of Queensland found an employer liable for workplace bullying under common law and health and safety laws in 1998.²⁷⁵ Further, at least three court rulings suggest that workplace bullying is addressed under the Australian common law.²⁷⁶

²⁷⁴ Yamada (2004), *supra* note 2, at 510.

²⁷⁵ See *Arnold v. Midwest Radio Unlimited*; Yamada (2004), at 510. See Sheehan et al., *supra* note 242.

²⁷⁶ "In a judgment handed down in December 1996, District Chief Judge Shanahan awarded more than \$170,000 in respect of damages attributed to the failure of defendants to exercise due care in managing the working environment (*Carter v. Pinawave* (1996) 1607 CJDC, cited in Gorman 1997). . . . In the second case an Australian Supreme Court judgment by Judge Arnold awarded almost \$550,000 in damages to the plaintiff in April 1998. Finally, in the third case, the Supreme Court in Cairns awarded a prison guard \$524,285 for psychiatric damage caused by pressures from management practices that cause undue and prolonged stress.

CHAPTER TEN:

SUMMARY AND IMPLICATIONS INSIGHTS INTO THE US AND INTERNATIONAL LEGAL RESPONSES

Despite the fact that the research participants in this study supported a legal response to workplace bullying, my analysis of the US legal system clearly shows that for targets of bullying in the American workplace, there is no adequate legal remedy. In the United States, statutory remedies are limited to a very select few instances of workplace bullying that can be classified as harassment based upon a protected status. Common law and administrative remedies are also inadequate remedies for targets of workplace bullying. However, internationally, statutory and common law remedies more effectively address workplace bullying.

In the United States, Title VII and other EEO laws exclude approximately 75% of bullying cases from protection because these bullying incidents are not based on a protected status. For the remaining 25% of incidents, judicial interpretations of the severe or pervasive requirement, unwanted element, and the harm element of unlawful harassment claims under the EEO laws present high hurdles to a successful claim. IIED claims have also proven to be ineffective remedies for targets of workplace bullying. The requirements of intent, severe emotional distress, and outrageous conduct all make these claims unlikely remedies for targets of workplace bullying. Administrative remedies do not appear any more appealing. For worker's compensation claims and unemployment claims, even if the target is successful in their claim, the remedy available would not make a target whole and would not serve as any type of real deterrent.

Internationally, Sweden, France, and the Canadian Province of Quebec have all passed specific statutes to eliminate workplace bullying. While these statutes may

have some potential gaps in coverage they provide much greater protection for targets of workplace bullying than anything in the US legal system. In the United Kingdom and Australia, protections of the right to employment (or the requirement that employers only terminate employment for cause) provide protections for targets of workplace bullying through unjust dismissal claims. Legal remedies are also available for targets of workplace bullying in Spain, Belgium, and Germany.

While some of the research participants in my study may have had cognizable claims under Title VII of the Civil Rights Act for racial, religious, or sexual harassment, even these few claims were not very strong. In each case there were questions as to whether the harassment was really based on a protected status. Further, the targets in these cases did not experience incidents as severe as many of the cases discussed in Chapter Eight that were dismissed via summary judgment. Further, several claims may have been interpreted as not being unwanted because the targets did not file a formal complaint with their employer. Likewise, few if any of the participants had any type of cognizable IIED claim. Based on the information the participants provided to me, all of their experiences would fall short of the requirement for severe emotional distress in an IIED claim; few could prove any of the intent required under these claims, and according to the focus groups, the bullying that was experienced was the norm of the workplace, not so unusual as to shock the conscience.

However, all 16 of the participants shared experiences that would most likely meet the definition of psychological harassment under the Quebec law, moral harassment under the French law, and victimisation under the Swedish law. Many of the participants also would have received greater protection through the case law in the United Kingdom. Of the 16 interview participants, 7 did leave their employer under what might be considered a constructive discharge. At least 5 other participants

wanted to leave, and if they had the opportunity to file a constructive discharge claim based upon the bullying environment as they would in the UK, they may have left their employment.

One of my initial hypotheses coming into this research was that the lack of US legal response to workplace bullying was a policy decision, not simply a lack of ability to address the issue. The fact that there have been so many international responses to workplace bullying that provide much greater protection to targets of workplace bullying supports this hypothesis and, I would now say, has allowed me to develop a theory grounded in this research. This theory is that the lack of coverage of workplace bullying in the United States is a political decision. However, this theory should be explored further and in more detail. The issue of whether the US has intentionally failed to address workplace bullying presents another potential avenue of research. This research should include an in-depth comparative analysis between the US and Swedish, French-Canadian, English, and French legal-political, socio-cultural, and economic environments. Further, research should be conducted into why bullying goes unaddressed in the US legal system. Some of the legal issues discussed in Chapter Four, such as the lack of protection of workers' rights and the emphasis on protecting property rights, should be explored as potential reasons for the shortcomings of the US laws. Other potential reasons for the lack of protection for workplace bullying, such as the First Amendment argument, the US view of equality, and the US legal focus on negative rights as opposed to positive rights all present potential explanations as to why the US has not addressed workplace bullying. Each of these reasons should be studied in detail.

CHAPTER ELEVEN:
SUMMARY AND IMPLICATIONS: UNDERSTANDING WORKPLACE
BULLYING AND BUILDING TOWARD A MODEL SOLUTION

In the course of this research I have gained a great deal of insight into workplace bullying. I have gained insight into the types and definitions of workplace bullying, the effects of workplace bullying, targets' reaction to workplace bullying, and the legal responses to workplace bullying here and abroad. This insight has allowed me to develop a new definition of workplace bullying as well as a number of theories about workplace bullying and a model linking workplace bullying to class consciousness and support for collective action. I developed this model around my findings in this research and have used it to link together a number of grounded theories about workplace bullying. This model is presented in Figure 1. This model presents the progression of targets' experiences with workplace bullying as interpreted through the stories shared by the research participants in my study.

Of course before bullying can occur certain conditions must exist. In this study, the clearest precondition to bullying was that the bully had to have some source of power over their target. The source of the power varied from bully to bully. This power varied from formal organizational or position power to physical power, and to information power. While many bullies in my study possessed formal power over their targets, many others did not. Participants shared experiences with bullies who were supervisors, co-workers, and even subordinates in the formal organizational structure. However, in every case, the bully was able to exert some form of power over their targets. In many cases, the power was formal. In one case the power difference was in physical power, in others it was information power, and in some it was relationship power. While power was always a theme of the workplace bullying experiences that

were shared, the definition for power in this case was very broad. Based on this common theme of power and the exploitation of power, I developed the theory that the solution to workplace bullying must balance power between the target and the bully.

Possession of a power source alone is not the only necessary precondition to workplace bullying. There are many instances of individuals having power (formal or informal) over another. In fact, in every hierarchical structure those in higher positions of authority possess formal power over subordinates. However, every situation of an imbalance of power does not lead to workplace bullying. Instead, the bully must be willing to engage in bullying or, in other words, willing to abuse their source of power, and the organization must in some manner allow for this bullying to occur. This organizational complicity in workplace bullying was another common theme of bullying, as discussed earlier in this dissertation. These antecedents are depicted in Section I of the model in Figure 1.

Once these antecedents exist bullying then occurs.²⁷⁷ The bullying that occurs takes many different forms. The bullying I discovered during this research ranged from schoolyard type of bullying through physical intimidation or screaming and yelling to the inappropriate application or use of otherwise standard and acceptable organizational practices and policies. This research has shown that defining workplace bullying is a difficult task. The insight into the experiences of the research participants has indicated that targets have widely varying definitions and experiences with workplace bullying. Different targets experience differing levels of intent, repetitiveness, and severity. Some participants endured long-standing, repetitive bullying. These experiences perhaps would fit into the traditional definitions of workplace bullying. However, others experienced severe single events that were just

²⁷⁷ There may be more antecedents to bullying than these three. Further, there may be numerous moderators or mediators of bullying at this stage as well. This is definitely an interesting and needed area of study. However, this was not within the scope or focus of this dissertation.

as damaging to their rights, but would often be excluded from the definition of workplace bullying that focus on bullying being repetitive. The forms of the bullying also differed for each participant. For several targets workplace practices were used as a form of bullying. These practices included the enforcement of a dress code, the removal from committees, the offering of training opportunities, assigning meaningless duties, and other managerial practices. For other participants the bullying took the form of yelling, hiding information, lying, berating, finger pointing, etc. Some participants experienced a type of low-grade incivility or passive-aggressive type of bullying that is often specifically excluded from the definition of workplace bullying. These various forms of bullying are depicted in Section II of the model in Figure 1.

One implication of the insights from this research is that the current definitions of workplace bullying tend to be under-inclusive. Definitions that include elements such as intent, repetitiveness, a heightened level of severity, heightened standards for proving the behavior as unwanted or unwelcome, or that eliminate specific behaviors such as incivility exclude many instances of workplace bullying that have a clear, negative impact on the targets. Further, because the behaviors of the bully can be so widely varied and unpredictable, any definition that focuses only on the behaviors of the bully rather than the outcomes to the target also may lead to a lack of coverage of workplace bullying. These external definitions of bullying also seemed to skew targets' own internal definitions of bullying, and this also led to underreporting and prevented the consciousness amongst targets that they had been bullied. These limited definitions will be discussed further in the discussion of Section V of the model.

At this point whether or not the targets have defined themselves as being bullied, the bullying does have an adverse effect on the targets and their organizations. These effects are depicted in Section II and IV of the model in Figure 1. All of the

research participants experienced negative outcomes. However, the level of, presence of, and type of tangible adverse effects varied from target to target. Many targets felt they were not treated with dignity at work. Many of the targets expressed a high level of stress and anxiety. Others described a loss of self-esteem and confidence. Others expressed anger, frustration, lower motivation at work, and even problems spilling over into their outside life. Some feared that they themselves became bullies due to their experiences as a target. The effects on the targets were not always obvious. Many of the targets were still exemplary employees and continued to stay with their employer. However, even these targets were often unhappy, had increased levels of stress, and many did eventually leave their employer earlier than they otherwise would have. All of the targets also expressed some experience with control. For many of the research participants the bully controlled their behaviors. The experiences made it less likely for them to speak out, kept them in line, or led to them performing tasks they otherwise would not have performed. Others expressed that their bullies tried to control them, but they did not allow this to occur. For many of the targets, the bully did control their behavior by forcing them to leave the organization or at least look for other employment.

The workplace bullying that was described by the research participants also had a negative effect on the organizations where the bullying took place. While bullying may have helped the bully further his/her own interests, the interests of the organizations were not followed. An expert financial analyst was removed from a finance committee, an office manager with ten years of experience left her position, a university administrator began spending work time looking for other employment, another administrator left the university. Bullying leads to poor organizational decision, turnover, loss of morale and, in some cases, an apparent spreading of a bullying culture.

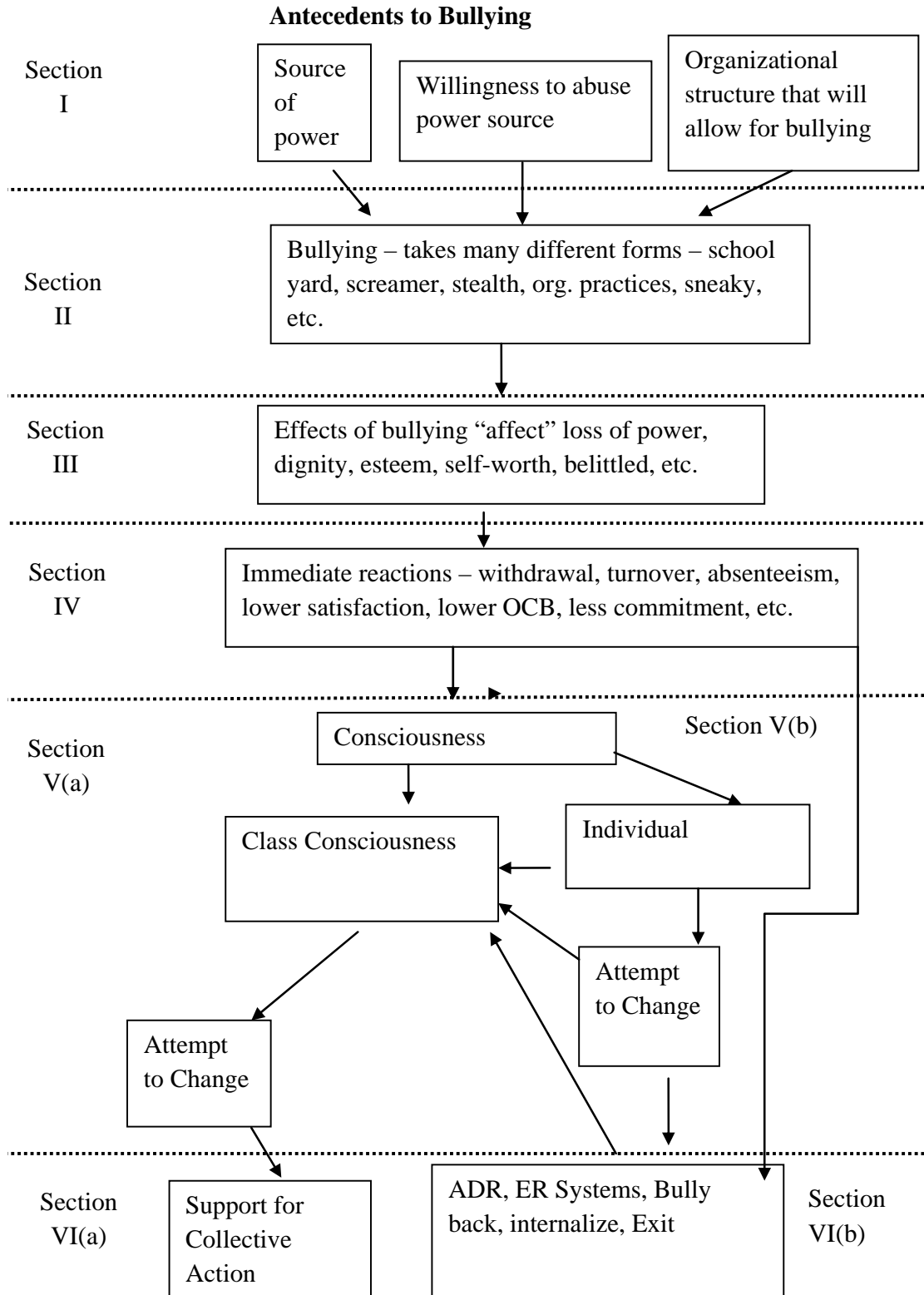


Figure 1. A model of the link between workplace bullying and the support for collective action.

Despite these diverse experiences and outcomes, I was able to identify common themes in regards to workplace bullying. Through these common themes of power and control and by looking at the experiences and the experiences that were shared with me as a whole, I was able to develop a new definition of workplace bullying. Workplace bullying is the unwanted, unwelcome abuse of any source of power that has the effect of or intent to control or intimidate or otherwise interfere with the target's human rights' including the rights to dignity, voice, esteem, growth' and the potential for self-actualization in the workplace.

Even as this definition became obvious to me from the stories that research participants had shared, and even as the bullying impacted the targets both inside and outside of work, the participants often did not define themselves as targets, or they did not define the actions they experienced as bullying. Instead, in many cases there was something that brought about a consciousness that they were targets of workplace bullying. For many of the participants, it seemed that perhaps their own internal definitions of workplace bullying prevented them from gaining this consciousness earlier. One research participant felt that she was overly sensitive or was a "whiner" for even talking about her situation. However, as she filled out the operational-based survey, she stated that she began to see her circumstances as "bullying." During the course of her in-depth interview she became more convinced that she was the target of workplace bullying. Another participant also stated that he had not considered himself the target of workplace bullying, until he completed the survey. After completing the survey, he asked to be an interview participant because he felt his experiences were "the perfect example of workplace bullying." It is important to note that even though this self-consciousness did not occur until after the survey, both of these respondents stated that they already were depressed from their work, they both were looking for other employment as a result of the bullying, and they were both extremely

dissatisfied with their current jobs. They simply had not gained the consciousness that they had been bullied. Instead, their own internal definitions of workplace bullying were preventing them from seeing their experiences as bullying. These participants as well as others stated that they thought of bullying as schoolyard type of bullying, that it was something “more obvious” or “in your face.” The external definitions of workplace bullying had most likely played a role in developing their internal definitions. This individual consciousness is displayed in Section V(b) of the model in Figure 1.

From an individualistic perspective, targets of bullying seem to take certain steps to attempt to end or deal with bullying, either as the effects of bullying are felt or after they gain this individual consciousness. These attempts to change their situation may include reporting the bullying to their employer, taking some sort of self-help measure (i.e. stress release or bullying back or ingratiation) or exiting the situation. Each of the potential solutions under this individualized reaction to workplace bullying will be discussed below in the discussion of Section VI of the model in Figure 1.

Separate from this individual consciousness in Section V(a) of the model there is a deeper form of consciousness that occurred with research participants who participated in the focus groups. Perhaps what was most interesting in this entire study was witnessing a “class consciousness” emerge amongst the research participants during all three focus groups. According to A.K. Rogers, class consciousness is “the disposition to find one’s common interests in connection with a well-defined and exclusive group of other men, and to allow this special connection to dominate one’s whole political outlook and activity.”²⁷⁸ In this case, the participants seemed to form a bond as a group, and perhaps even began to identify themselves in class terms as part

²⁷⁸ A.K. Rogers, Class Consciousness, 27 No. 3 INTERNATIONAL JOURNAL OF ETHICS 334 (Apr. 1917).

of labor and their employers as part of the ownership class or capital. During the focus groups, participants would support each other when they doubted they had been bullied. Upon hearing their fellow participants' stories, participants were quick to take to the defense of their participants, to point out that they "should not have had to put up with that at work," and to convince the other participants that they had indeed been targets of bullying. An example of this occurred during one focus group when an individual stated that she did not know if it was bullying when her manager denied her time off for religious purposes when other employees had been granted similar time off for many reasons and she had been assured that the time off would be available when she accepted the employment. Very quickly, two other participants expressed their outrage at her manager's actions and assured her that this was bullying. Similar examples occurred in all three focus groups.

As participants shared their stories of bullying they began to act as a "class" of workers, and collectively determined that their employers would not voluntarily help them or protect them from bullying. The sharing of these stories during the focus groups was a very similar experience to those described by Jo Reger that took place as part of the organizing and consciousness raising effort at the NYC NOW chapter.²⁷⁹ While the sessions in Reger's study were intended at least in part to lead to collective action and mobilization, the consciousness raising that occurred during the focus groups on workplace bullying was entirely unintended, yet produced a strong support for collective action. This support will be discussed further in the next section.

Before beginning the final piece of this discussion on the actual application of potential remedies to workplace bullying, it is important to note that the individual and class consciousness that I witnessed were not mutually exclusive events. In fact, in

²⁷⁹ Jo Reger, *Organizational "Emotion Work" Through Consciousness-Raising: An Analysis of a Feminist Organization*, 27 No. 2 QUALITATIVE SOCIOLOGY (Summer 2004).

order for the class consciousness to occur, individuals often had to be convinced that they had been bullied and that they shared this in common with the other participants. This individual consciousness may have transformed to class consciousness at the realization that one had been bullied or at times after unsuccessful attempts to engage in the individualized remedies in Section VI(b) of the model. Class consciousness even occurred in one of the focus groups where an individual never really believed she had been bullied, but did see how the actions she experienced would be considered bullying by others.

Potential Solutions to Workplace Bullying

The last section of the model, Section VI, represents the potential solutions to workplace bullying. Section VI(b) represents individualized solutions to workplace bullying. These are the solutions that I would expect to see utilized by a target who perhaps has reached an individual consciousness that they are the target of some unfair treatment at work but have not reached the class consciousness that I witnessed during the focus groups. As will be discussed below, these solutions do have some value and should be studied. However, these solutions also appear to all fall short for various reasons. In Section VI(a), there is simply a box containing the term “collective action.” Once this class consciousness occurs it is my theory that the best solution to workplace bullying involves a collective response. It is through this collective response that power is equalized. This collective action, as will be discussed below, includes both collective action as a social movement for legal changes and collective action as defined under the National Labor Relations Act.

Solutions on the Individual Consciousness Side of the Model

Legal solution—The common law

While current attempts to address workplace bullying through common law tort claims have not been successful, this does not mean this path should be completely abandoned. Perhaps there is indeed a role for creative lawyers, legal scholars, and judges to craft common law remedies to address workplace bullying. More study should be undertaken to see how workplace bullying may fit into the underlying theory of the US common law system and even specific tort claims in other areas of law outside of the employment realm. Perhaps further exploration of potential claims such as negligent supervision or hiring of bullying employees, breach of contract (implied or otherwise) claims, claims for allowing a dangerous working environment, etc. may provide at least a partial solution to the problem with workplace bullying. Perhaps some power and control can be returned to targets of bullying through aggressive litigation. However, given the current judicial interpretations of unlawful harassment and intentional infliction of emotional distress as discussed in Chapter Seven, it does not appear that this solution will provide much protection. However, this solution could have a role in the model linking workplace bullying to collective action. For instance, knowledge of these suits may bring a quicker consciousness to targets of workplace bullying. This may speed both the individual and the collective consciousness gaining. As targets become aware of other targets who have filed lawsuits, whether successfully or not, this might also lead to the class consciousness that was experienced in the focus groups. In fact, Regar points to outside events such as the Thomas-Hill hearing as assisting in the consciousness raising efforts of the NYC NOW chapter. These lawsuits might have this same effect. Bachman likewise supports the idea that court decisions may assist social change if

they change the views of the populace.²⁸⁰ As I witnessed with the survey of students regarding the unlawful harassment decision, a court decision does not necessarily have to favor one's viewpoint to further support or cement such a viewpoint.

Voluntary employer anti-bullying policies

Another potential individual solution to workplace bullying lies in a CSR approach to employer policies: in other words, an approach that relies on employers to take the necessary steps to eliminate bullying as part of their responsibility to society. Without legislation making workplace bullying unlawful and requiring employers to take steps to eliminate workplace bullying, we are left with simply relying on employers to eliminate workplace bullying, either for selfish reasons or for ethical reasons. Archie Carroll suggests that moral managers undertake a pyramid of responsibilities; these responsibilities include capital—the responsibility to make a fair return on profit for investors/shareholder, legal—the responsibility to follow all applicable laws, ethical—the responsibility to uphold societal expectations of the corporation, and philanthropic—the responsibility to give something back to society.²⁸¹

The astute employer would see that protecting employees' dignity at work and in particular ridding the workplace of bullying would be a benefit to each one of these responsibilities. Workplace bullying is damaging to organizations and makes it more difficult for managers to achieve capital goals. Workplace bullying can be devastating to employees. As a stakeholder in corporations, it is thus the ethical responsibility of corporations to eliminate workplace bullying. Targets of workplace bullying are also more likely to sue employers.²⁸² Therefore, based on Carroll's Pyramid of Corporate

²⁸⁰ STEVE BACHMAN, *LAWYERS, LAW, AND SOCIAL CHANGE* 16–17 (Unlimited Publishing 2001).

²⁸¹ Carroll, *supra* note 40.

²⁸² Coleman, *supra* note 16.

Social Responsibility, one would expect moral employers to eliminate workplace bullying as a way of meeting their capital, legal, and ethical responsibilities.

However, there is a great deal of evidence to suggest that employers will not eliminate workplace bullying out of some sense of responsibility to target employees or even as a means to meet legal responsibilities. For instance, problems with workplace harassment persist despite the fact that it is clearly an employer's responsibility to eliminate unlawful harassment from the workplace.²⁸³ The fact that there are so many successful lawsuits against employers for harassment, discrimination, retaliation, and other workplace violations suggests that left on their own, employers do not even meet the second level of Carroll's pyramid of social responsibility—legal obligations. Further, according to Anna-Marie Marshall, harassment policies or grievance systems as they exist today in many companies may actually be counter-productive to eliminating harassment from the workplace. These systems often times redefine harassment in such a manner that many complaints are not filed and many actually harassing behaviors are never addressed.²⁸⁴ In other words, even when employers meet their legal responsibility under *Faragher* and *Ellerth*, the policies that are instituted do not meet the ethical responsibility of eliminating employee-damaging harassment from the workplace. Marshall proposes that these policies are not implemented to meet legal standards or to protect employees, but rather they are implemented to protect the employer.²⁸⁵

²⁸³ For instance, in 1986, the Supreme Court first held that workplace harassment could definitively be considered a form of discrimination under *Title VII, Meritor Savings Bank v. Vinson*, 477 US 57 (1986); further standards for employer liability were established under *Harris v. Forklift Systems Inc.*, 510 US 17 (1993), *Oncale v. Sundowner Offshore Services, Inc.* 118 S.Ct. 998 (1998), *Faragher v. The City of Boca Raton*, 524 US 775 (1998) and *Burlington Industries, Inc. v. Ellerth* 524 US 742 (1998). See Anne Lawton, "Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense," 13 COLUMBIA JOURNAL OF GENDER AND LAW 197 (2004) for an analysis of the incentives for employers to simply construct policies rather than to truly attempt to eliminate harassment.

²⁸⁴ Marshall, *supra* note 168.

²⁸⁵ *Id.*

If this is the case, then it would be doubtful that employers would meet the higher level of social responsibility of ethical obligations. Looking at corporate codes of conduct provides an idea of similar responses to ethical concerns. In a comprehensive study of corporate codes of conduct, Jenkins, Pearsons, and Seafring found that corporate codes are not about corporations deciding to do good or to do the right thing.²⁸⁶ Corporate codes are rather the result of struggle between interested groups. In those codes that a corporation adopts without input from other stakeholders, the breadth of the code both in terms of substantive and procedural due process is very narrow. Only when other interest groups such as unions or NGOs are involved does one see codes that cover many topics and have strong enforcement measures.²⁸⁷ The Jenkins et al. research supports the conclusion by Namie and Namie that employer policies are not in place to meet employee interests.²⁸⁸ Therefore, it is unlikely that any voluntary employer anti-bullying policy will meet the needs or rights of the target employees, except where these needs overlap with those of the organization. This of course would apply to anti-bullying policies, harassment policies, and employer-implemented ADR policies.

According to Lieberwitz, the current labor conditions in the US, including work reorganization, corporate relocations, subcontracting for cheap labor, and corporate bankruptcies, all point to a lack of true voluntary corporate social responsibility.²⁸⁹ Further, actual experiences with workplace bullying already suggest that employers will do little voluntarily. According to Namie and Namie, in only 18% of cases where target employees went to their employers for help did the employer

²⁸⁶ RHYS JENKINS, RUTH PEARSON, & GILL SEYFANG, *CORPORATE RESPONSIBILITY AND LABOR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY* 28 (Earthscan Publications 2002).

²⁸⁷ *Id.* at 22 & 28.

²⁸⁸ NAMIE & NAMIE, *supra* note 1, Ch. 7.

²⁸⁹ RISA LIEBERWITZ, *What Social Responsibility for the Corporation? A Report on the United States*. International Seminar on Comparative Labour Law, Industrial Relations and Social Security (July 2004).

react in a helpful manner. In 43% of such cases, the bully's boss made the situation worse, and in 40% of the cases they did nothing. Further, few companies have HR policies that address bullying, and even fewer enforce these policies.²⁹⁰ Finally, a review of the sexual harassment literature post-Faragher and post-Suder reveals many articles such as Nagle's that suggest the courts have given employers "strong incentives" to implement harassment policies so that they have an affirmative defense to sexual harassment claims.²⁹¹ The presumption is that the pervasive and severe effects of workplace bullying on individuals and organizations is simply not enough incentive that every employer should have a fully enforced anti-bullying policy.

However, there is still the possibility of having anti-bullying policies that are indeed enforced where such policies are also a benefit to the organization, or in other words, help employers to meet their capital responsibilities. Just as workplace bullying can be devastating to victim employees, as discussed earlier, the effects can also be quite severe for organizations.

While Namie and Namie have studied the prevalence of anti-bullying policies in organizations, there is still a question as to whether anti-harassment policies are being adopted in a broad manner or are being interpreted broadly. However, even where broad policies are adopted, they may or may not be effective.

The research participants in this study had little faith that employers would adopt voluntary systems, and of course this belief was justified. After all, for all of these participants, their employers failed to address their bullies' behaviors on a voluntary basis. Many of the research participants stated that bullying was often a benefit to employers as it could be used as a means to control or even to force someone out. During the course of the first discussion group, the participants all

²⁹⁰ Namie & Namie, *supra* note 236.

²⁹¹ Mark E. Nagle, *Suders: The Supreme Court Reaffirms the Value of an Anti-Harassment Policy*, 30 EMPL. REL. L.J. 14, 20 (2004).

agreed very strongly that voluntary employer systems were unlikely to address the issue of workplace bullying other than on a very limited basis. Further, this solution does little to really change the power structure. The target is not really empowered; instead the employer maintains power over the process and the outcomes of the process.

So while this solution is not the best option for eliminating workplace bullying, it still may hold some value and at the least merits further exploration. Very simply, a beginning step of exploration may be to determine whether these employer-based systems even exist and, if so, in what types of numbers. A survey of employers may provide insight into this question. However, even if the policies exist in name, investigation should occur into whether these policies are enforced in a manner that helps to prevent workplace bullying. Information concerning investigations is most often considered proprietary by organizations and would be difficult to obtain, particularly in a large-scale survey type of undertaking. While organizations may not be willing to provide specific information of actual investigations, employee relations managers, conflict resolution managers, attorneys, etc., who handle the investigations under these broad-based policies may be willing to provide more hypothetical-type answers to questions such as “Does your policy prohibit [specific actions that we would consider bullying]?” Complainants and targets of bullying may also be more willing to share their experiences. For instance, Namie and Namie have conducted a large web-based survey of victims of workplace bullying. One could study whether targets such as these were knowledgeable of their workplace harassment policies and whether these policies were enforced in such a way as to protect them from bullying behaviors. Case studies of willing employers and employers that are looking to implement true anti-bullying policies may also be telling. Higher education may be a particularly interesting area to study, as bullying has been found to be very prevalent

in academia,²⁹² while many institutions at the same time have broad-based harassment policies (possibly due to *St. Paul v. R.A.V.*, according to Coleman) and these policies are often open to the public.²⁹³

Where new policies are implemented, a pre and post implementation study of employees would be a possible method of ascertaining the effectiveness of such policies. There are numerous surveys that are currently used to determine the level of bullying behavior in organizations, such as Lehman's LIPT Questionnaire, the NAQ, and the widely used and highly reliable GHQ.²⁹⁴ These surveys could be used prior to the implementation of such a policy and several months after the full implementation of a new policy to measure the difference. Further, qualitative interviews could then be used to determine why and if the policy made a difference in the environment.

Finally, the presence of such policies may indeed also aid in the eventual establishment of a legal remedy. First, the most direct method, as suggested by Vanderstat, is that these policies may be interpreted as forming an employment contract. Second, if these policies are widely interpreted, perhaps having such a policy would be interpreted as a requirement to being a reasonably prudent employer, and to not have such a policy would open up an employer for liability for psychological harm to the targets of bullying or harassment in the workplace. Finally, Edelman suggests that there is an endogeneity between the employment laws and employer policies in the United States.²⁹⁵ In other words, employment laws result in specific employment practices, but employment practices also impact the interpretation and implementation of employment laws. If these voluntary systems became commonplace, perhaps

²⁹² MCCARTHY & MAYHEW, *supra* note 22.

²⁹³ Coleman, *supra* note 16.

²⁹⁴ See McCarthy and Mayhew, 2004 and also Claire Mayhew et al., *Measuring the Extent of Impact from Occupational Violence and Bullying on Traumatized Workers*, 16 EMPL. RESP. & RTS. J. 117 (2004).

²⁹⁵ Lauren Edelman, Christopher Uggen, & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedure as Rational Myth*, 105 No. 2 AM. J. SOCIOL. (1999).

eventually this endogenous effect would lead to the passage of anti-bullying legislation.

There are many different avenues to study these broad-based harassment systems, and there are very few studies that provide much information even as to the existence of such policies. How one can study these systems is an avenue that will need to be explored in greater detail.

Employer ADR programs

Estreicher suggests that employer-implemented ADR programs that include mandatory arbitration are a benefit to employees, employers, and the court system.²⁹⁶ Estreicher suggests that the current legal system without ADR presents a system of “cadillacs” for wealthy employees and “rickshaws” for lower-level wage earners. The low-level wage earners, according to Estreicher, cannot often “attract the attention of private lawyers because the stakes are “too small,” and “very few . . . are able to obtain a position in this ‘litigation lottery.’”²⁹⁷ Seber and Lipsky suggest that the employment arbitrators as actors in this system may be at least in part replacing the collective action described below in the discussion of the collective solutions to workplace bullying.²⁹⁸

Complaints that would not fall under any statutory or common law provision are often heard under these systems. Bullying could be one such type of complaint. As discussed above, employees who have been the victims of bullying will not get a chance to have their case heard by a national tribunal unless they can show such bullying was based on a protected status and led to an adverse job effect, or that such

²⁹⁶ Samule Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RES. 559 (2001).

²⁹⁷ *Id.* at 563.

²⁹⁸ Ronald L. Seber & David B. Lipsky, *The Ascendancy of Employment Arbitrators in US Employment Relations: A New Actor in the American System?*, 44 No. 4 BRITISH J. IND. REL. (2006).

bullying was intentional and extremely outrageous. However, perhaps in the arbitration or even an employer-mandated mediation program, claims of bullying may be addressed.

Leader and Burger suggest that ADR has the potential to “revolutionize employment law.” They point out that in employment litigation, many complainants can never get to the courtroom because they cannot afford an attorney, and even when employees get into the courtroom their success rate at trial is less than 15%. They suggest that the greater access to employer-sponsored ADR systems than the courtroom will better help employees to bring their statutory claims.²⁹⁹ In addition to allowing employees to have a better opportunity to bring statutory claims, these systems may also allow employees to bring claims such as workplace bullying. However, the research here, as well as research by Fox and Stallworth, suggests that there is limited support for internal employer-based dispute resolution systems as a means to address workplace bullying.³⁰⁰

Perhaps most importantly, these systems garnered little support from research participants. During the focus groups especially, participants were again concerned with the level of employer control over these systems. Only one participant during the interviews gave any support to an ADR system as a solution. In addition to being concerned about employer control over these systems, participants were also skeptical as to whether these systems really would in any way equalize power.

Again, future studies of these workplace ADR systems would be very similar to the studies of the employer-sponsored broad-based harassment systems. I would be

²⁹⁹ Laurie Leader & Melissa Burger, *Let's Get a Vision: Drafting Effective Arbitration Agreements in Employment and Effecting Other Safeguards to Insure Equal Access to Justice*, 8 EMPL. RTS. & EMPLOY. POL'Y. J. 87 (2004).

³⁰⁰ Suzy Fox & Lamont E. Stallworth, *Employee Perceptions of Internal Conflict Management Programs and ADR Processes for Preventing and Resolving Incidents of Workplace Bullying: Ethical Challenges for Decision-makers in Organizations*, 8 EMPL. RTS. & EMPLOY. POL'Y J. 375 (2004).

very interested in a deeper understanding of these systems. Why might they provide greater avenues of redress? What are the views of arbitrators that make decisions under these systems in regards to the application of human rights versus legal rights, etc.?³⁰¹ Qualitative studies of these systems will provide these types of details and help us to answer questions such as why these systems do/do not work, how employees feel about these systems, and whether the existence of these systems changes the employees' attitudes and actions toward litigation.

In addition to these potential solutions to workplace bullying, targets of bullying at the individual-consciousness level or even without the consciousness also reacted to bullying in other individualized ways. For instance, one target dealt with the bullying during his drive home from work. He stated that he would play loud music to relax and get his mind off of the bullying. Another individual would talk to her mother about her bullying. Another target used ingratiation techniques toward his workplace bully. Another target bullied back. These last two techniques seemed to focus on trying to take some of the power back from the bully. However, many of the targets exited their organizations where they were bullied. None of these techniques are really effective remedies to workplace bullying. Instead, they are at best coping mechanisms. However, again, until an effective remedy for workplace bullying is available for all targets of workplace bullying, these coping mechanisms do indeed have their place.

Collective Remedies

Legal solution—Statutory response

Based on my research, the best solutions to workplace bullying will require collective action. These solutions are included within the collective action box on the lower left-hand corner of the model in Figure 1. Based on this initial research the best

³⁰¹ For an example *see* Gross, *supra* note 68.

solution to workplace bullying is a workplace bullying statute. It is only through a strong law with strong enforcement that employees' rights to dignity in the workplace, their esteem, growth, and power, will be truly protected. For each of the research participants, voluntary solutions did not address their experiences. There were no actions taken by any of their employers to voluntarily deal with workplace bullying, and there were no alternative remedies available to these participants other than to search out new employment, to learn to deal with the bullying, or in some limited cases to directly confront the bully. Further, workplace bullying is not a new phenomenon; if employers were going to voluntarily address this issue, they could have already done so. In order to protect all targets of workplace bullying, legislation is necessary.

However, as discussed above, there is no specific US law that protects worker rights to dignity at work or to "just and favourable" working conditions. The protections afforded targets of workplace harassment under Title VII of the Civil Rights Act, the ADEA, NLRA, and ADA provide some level of protection for employees, but these fail to address more than 75% of bullying incidents. Further, common law claims of invasion of privacy and intentional infliction of emotional distress may also provide some protection for employees' dignity at work. However, these protections are largely ineffective.³⁰² Even for the limited protections provided

³⁰² For examples of studies concluding that US law is ineffective in combating workplace bullying in addition to the research completed here, see David C. Yamada, *The Phenomenon of 'Workplace Bullying' and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEORGETOWN L. REV. 475 (2000) exploring gaps in coverage under EEO harassment case law and intentional infliction of emotional distress claims, David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMPL. RTS. & EMPLOY. POL'Y J. 475 (2004) calling for a legislative response to combat workplace bullying, and Brady Coleman, *Pragmatism's Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence*, 8 EMPL. RTS. & EMPLOY. POL'Y J. 239 (2004), also exploring the lack of effectiveness of Title VII, tort claims and worker's compensation as means of combating workplace harassment and bullying.

by these statutes and common law rulings, access to the remedies are limited by the difficulty litigants have in obtaining counsel and succeeding at trial.³⁰³

Passing legislation against workplace bullying, particularly in the current pro-business and anti-regulation of commerce environment, is a difficult task, to say the least. Until we can rid ourselves of the politicians who have, as Yates suggests, “bent over backwards to implement what amounts to a full-scale assault on working people,” such a law will never come into effect.³⁰⁴ Further, even if legislation is passed, it often takes years to determine the definitions of legislation, and attorneys often work hard to find paths around and loopholes to such legislation. Legislation to protect the right to dignity at work would be a sweeping change to our current legal environment of the workplace. However, such sweeping changes have occurred in the past.

For instance, the Civil Rights Act of 1964 was clearly a major change to the environment of work. This change came about as a result of a social movement and collective action.³⁰⁵ On a national scale, collective action by advocates, attorneys, politicians, and others was vital to the passage of the Civil Rights Act.³⁰⁶ On a smaller scale, collective action has been critical in the push for a living wage and other local and state protections of worker rights.³⁰⁷ The best solution to workplace bullying will be a strong law with strong enforcement, and a collective social movement is critical to the passage of such a law.

Protection of workers’ human rights in the workplace would indeed be a profound change to the current US legal system. As is suggested by Bachman, such a change requires a social movement.³⁰⁸ In order to involve masses of people in such a

³⁰³ See Estreicher, *supra* note 296, at 570.

³⁰⁴ Yates, *supra* note 84.

³⁰⁵ DENNIS CHONG, *COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT* (The University of Chicago Press 1991).

³⁰⁶ *Id.*

³⁰⁷ For discussion of this type of collective action, see BACHMAN, *supra* note 280.

³⁰⁸ *Id.*

movement, according to Chong, it becomes necessary that individuals be able to identify social and psychological benefits from their participation.³⁰⁹ Much in the same way that one makes a decision to participate in the collective action of forming a union, I would suggest that individuals must be able to identify a benefit of such movement (or a detriment of the status quo) and believe that the movement will be able to produce such a benefit.³¹⁰

First, there needs to be an education of workers to inform them that bullying does not have to be a part of work and that their human rights in the workplace could be afforded legal protections, as in the laws of Sweden, France, Quebec, and the United Kingdom. Workers are often unaware of what few legal protections they currently have in the workplace, especially in comparison to other industrialized countries. My experiences in teaching employment law to undergraduate students have been that many students believe employers in the United States can fire them only for good cause, that the United States must have the most employee-friendly leave laws, vacation time, and other benefits of any country around the world. Students are often shocked and outraged when they learn about the state of employment law in the United States and especially when I cover comparative laws. If the average worker is like my average student, they have no reason to be outraged, because they believe the laws in the United States are much more protective of their rights than they actually are. Targets of bullying also may not be aware of their own working conditions. One research participant stated that she could not be bullied because she would not allow it to happen to her. During the course of one focus group, in response to other

³⁰⁹ CHONG, *supra* note 305.

³¹⁰ See Roger Weikle, Hoyt N. Wheeler, & John A. McClendon, *A Comparative Case Study of Union Organizing Success and Failure: Implications for Practical Strategy*, in ORGANIZING TO WIN Ch. 12 (Kate Broffenbrenner, Sheldon Friedman, Richard W. Hurd, Rudolph A. Oswald, & Ronald L. Seeber eds., 1998) and also JOHN W. BUDD, *LABOR RELATIONS: STRIKING A BALANCE*, Ch. 7, 239–204 (2nd ed. 2008).

participants' stories, she decided that she had indeed been bullied and became angry about the bullying. Another participant said she never thought of her situation as bullying until she filled out the initial survey. After that she explored her working situation in more detail and began to notice all of the negative effects from her work that were spilling over into her home life. Education about the current legal system in the United States and about workplace bullying is the first step to establishing this social movement.

Second, more needs to be done to convince workers that collective action can be successful and to convince individuals that only through such collective action will there be any benefit. Chong suggests that individuals will get a social benefit from participation when they have some sort of moral sense of requirement to participate,³¹¹ for instance, if they believe that their participation is important to benefit those with whom they have social ties. The sharing of stories of targeted employees may be one way to create such feeling of obligation. Chong also suggests that the potential to play the Good Samaritan and the potential feeling of accomplishment in engaging in a social movement can also spur individuals to participate.³¹² It is critical to spur such a movement. Without this social movement, there is little reason to expect that laws to protect employees will be passed, and without such laws it is unlikely that bullying will ever be eliminated from the workplace.

Unionization

A second solution is also possible through collective action. This solution is collective action through union organizing. Again, this solution received a great deal of support from research participants. According to Yates, it is through collective

³¹¹ CHONG, *supra* note 305.

³¹² *Id.*

action, organizing, and collective bargaining that many steps have been taken to protect worker dignity.³¹³ As such, organizing and collective bargaining are other potential options to eliminating bullying from the workplace. Yamada presents three ways that collective bargaining can be used as a tool to combat workplace bullying. “First, unions can and should bargain for collective bargaining provisions that protect their members against abusive supervision. Second, even in the absence of specific protections against abusive supervision, the general substantive and procedural rights in an agreement may provide legal protections for a bullied union member. Third, effective shop stewards can serve as valuable mediators when bullying situations occur, including those between union members.”³¹⁴ While these three potential solutions are viable, there are still many problems.

The first question to explore is whether anti-bullying clauses are indeed bargained for in CBAs. Second, even if these clauses exist, further examination would be needed to determine whether these clauses effectively eliminate workplace bullying. Third, even if these clauses exist and are effective, clauses that only address supervisor bullying still leave many cases of bullying unanswered. While the majority of bullying incidents may be supervisory bullying,³¹⁵ and while bullying from a supervisor does tend to have a greater impact on the victim,³¹⁶ a policy that covers only supervisory harassment would leave many incidents uncovered. In particular, bullying that occurs between bargaining unit members may, at the least, present difficult situations for a union steward to manage. Fourth, the substantive and procedural rights that are addressed by Yamada do provide greater protection (most likely referring to just cause dismissal) and would be most related to the above

³¹³ Yates, *supra* note 84.

³¹⁴ Yamada, 2004, *supra* note 2, at 494.

³¹⁵ *Id.*

³¹⁶ Keashley & Neuman, *supra* note 7, at 350.

discussion of constructive discharge in a just cause setting. Study should be undertaken to determine whether quitting as a result of workplace bullying is determined to be unjust dismissal in an organized setting. Finally, perhaps the biggest problem with union organizing as the means to eliminate bullying is that even if this is a viable solution, at this point, it will only be a viable solution for a very small percentage of the labor force. Only 7.5% of US employees are unionized.³¹⁷ However, perhaps if there is success in eliminating workplace bullying through CBAs this would be an additional organizing tool for labor organizations and a potential path to revitalization of the labor movement. The support for collective action in this study, combined with the lack of support for employer ADR systems in this study and that of Fox and Stallworth,³¹⁸ may indicate that a focus on the issue of bullying in the workplace within the course of organizing campaigns may bring more support to unionization and stem the tide of ADR as a replacement for traditional collective bargaining that Seber and Lipsky found in their study.³¹⁹ Further, many of the legal protections afforded to employees came about due to the labor movement. Perhaps if bullying were first addressed in collective bargaining agreements, this would provide at least some momentum for the passage of anti-workplace bullying legislation.

In the course of this research, on several occasions I asked research respondents if they would be willing to join a union if workplace bullying were one of the issues the union was promising to address. Each of these respondents was very interested in this possibility. The retiring faculty member suggested that he felt this was an issue of the current organizing drive at his university and that he would join the union in a second if state employees actually had collective bargaining rights in West

³¹⁷ According to the most recent BLS report on union membership, despite a small uptick private sector union membership in the U.S. is only 7.5%. BLS Economic News Release, Union Members Summary (January 25, 2008). <http://www.bls.gov/news.release/union2.nr0.htm>

³¹⁸ Fox & Stallworth *supra* note 300.

³¹⁹ Seeber & Lipsky, *supra* note 298.

Virginia. Other university participants indicated that they either were active in the organizing movement or would support the movement if they felt workplace bullying would be addressed. One research participant stated that he felt an organizing campaign would be a great idea, but he would be concerned that it would just be thwarted by any employer. He used his wife's employer as an example of this and stated that after an organizing campaign was defeated there, life became tougher for those who supported the campaign.

Of course, even if targets of bullying supported organizing campaigns, this would not guarantee that there would be enough support for a successful campaign. However, it would be interesting to see what role bullying plays in collective bargaining agreements and in organizing drives. Further, information on this role may provide several benefits. If bullying is found to be a potential reason for organizing, labor organizers may have an avenue to help revitalize the labor movement. If bullying supervisors are a greater concern to employees than the health benefits and compensation drivers of organizing campaigns, then this may suggest the need to shift direction in the labor movement, at least in certain settings.

There are many potential methods to explore the connections between workplace bullying and collective action. First, a review of current CBAs to assess whether workplace bullying is a commonly addressed concern could be important. Second, further exploration of potential union members and whether the focus on workplace bullying would spur them to join a union would be an interesting study. Case studies of organizing campaigns and the role of workplace bullying would also be a potential avenue of research. Interviewing organizers, employees who have engaged in organizing and studying specific organizing campaigns, may provide a great deal of insight as to the role of bullying in organizing campaigns. Further, surveys of employees of successful and unsuccessful campaigns may shed light on

whether bullying supervisors played a role in their thought process. Again, I feel this is a very interesting area to explore and has a great deal of potential for future research and also potential for at least a partial solution. A strong union that fights for the employees they represent does indeed return power and control to employees. In fact, as I have often explained during the AFT organizing drive, a union really is nothing more than the employees all working together. Employees are the union, and by working together the employees create their own collective power and take back at least some control over their working environments. The major problem with this decision again seems to be not whether the solution itself is a good idea, but rather how it can be implemented. In the current environment, organizing drives often fail not because employees do not want unions, but because of employer actions and lax labor law protections.³²⁰

Grievance arbitration

Grievance arbitration is another potential alternative to legislation. While these arbitrations are based on the language of the CBA and thus this is related to the above discussion of CBAs, grievance arbitration could lead to other methods of eliminating workplace bullying and protecting the human right to dignity at work. For example, Professor Gross has proposed a human rights approach to grievance arbitration.³²¹ If this standard were extended to grievance arbitration, then harassment disputes under CBAs would be decided in a manner more related to our definition of workplace bullying rather than the legal definition of harassment. At the very least, some of the gaps in the harassment definition could be closed. For instance, the level of severity could be reduced. Less focus could be given to employer defenses that the harassment

³²⁰ Levin, *supra* note 82.

³²¹ Gross, *supra* note 68.

was not based on a protected status, and more focus could be placed on the outcomes to the employee of the harassment and not just concern for damaging job effects.

However, there have been studies of harassment complaints in the grievance arbitration process. It appears, at least according to Bornstein, that the outcomes of these complaints follow the same definition as the legal definition of workplace harassment.³²² However, again, further research specifically into the outcomes of claims of workplace bullying or general non-status based harassment would be a worthwhile undertaking.

While both of the solutions under the class-consciousness side of the model appear to be viable and strong possibilities for ending workplace bullying, there are still many gaps that need to be filled. In the university setting, there was definitely a link between a bullying president and the AFT organizing drive. Further, during the focus groups there was much support for collective action to eliminate workplace bullying. However, after these focus groups, the momentum was lost, and to my knowledge none of the participants actually engaged in collective action. While these focus groups created the consciousness necessary to lead to support for collective action, there are still missing pieces to actually get to the step of taking collective action. The pieces necessary for the next step may include a leader to push the group's agenda, continued discussions amongst the class members, a stronger acceptance of the utility of collective action, or a more secure feeling that the laws will protect them in their attempts at collective action. It is answering this question of what moves these individuals from this acceptance of collective action to engagement in collective action that is the most pressing piece of research in this area.

³²² Tim Bornstein, *The Arbitration of Sexual Harassment Cases*, 4–7 BENDER'S LABOR & EMPL. BUL. 13 (2004).

Conclusion

Through this research I was able to gain enough insight into workplace bullying to have a better understanding of the types of workplace bullying, the effects of workplace bullying, and the reaction to workplace bullying. By looking at each element of the definitions of workplace bullying including the repetitive nature, the requirement of intent, unwantedness, severity, and power imbalance, I was able to develop a new definition of workplace bullying. This new definition—the unwanted abuse of any source of power that has the effect of or intent to control or intimidate or otherwise violate the target’s human rights including the rights to dignity, voice, esteem, growth, and the potential for self-actualization in the workplace—is more encompassing and better matched the experiences of the 16 targets of workplace bullying in this study. Further, this definition stood the examination of three focus groups. This definition may be able to bridge the gap between the operational and self-reporting prevalence rates and also, by providing a better understanding of the phenomena of workplace bullying, allow us to better approach preventing and resolving bullying in the workplace.

This definition also leads into the next piece of the critical management studies analysis—that of a critique. This broad definition and the evidence supporting this definition lead to the possibility that the entire system of employment in the United States may indeed itself be a form of bullying. This suggests a starting point for the critique of a situationally sensitive analysis of the current employment system.

This research also allowed me to develop a model of the linkage between workplace bullying and collective action. This model presents a call for steps to create a class consciousness amongst targets of workplace bullying in order to further the support for collective solutions to workplace bullying. These collective solutions—a social movement for legal changes and collective action amongst employees—appear

to be the most viable solutions to workplace bullying. However, this model also leaves open the need for exploration of various potential solutions for workplace bullying. This should include further testing of attitudes toward different individualized and collective solutions similar to the work completed by Fox and Stallworth,³²³ as well as studies of the effectiveness of these various systems. Through this greater understanding of the acts that define workplace bullying, the effects of these acts, the reactions of targets, and the relation of these to the potential solutions, researchers and advocates for targets of workplace bullying can work together to eliminate this problem from the workplace.

³²³ Fox & Stallworth, *supra* note 300.

APPENDIX A:

PERSONAL REFLECTION

As I began this research I felt that I would be able to quickly understand workplace bullying and then to develop a model solution to this problem. I believed that I would be able to complete all three steps of a critical management studies work—gaining insight, critique, and a transformative redefinition. I held this belief in part because I had my own experiences with workplace bullying. I had trained supervisors who were considered bullies, I had engaged in collective bargaining negotiations where a supervisor's bullying became an important topic at the table, I had represented clients who were bullied at work, and I had even witnessed and, I felt, been a target of workplace bullying myself. To me, many of these experiences seemed very similar in nature, at least in the underlying themes beyond the specific tactics used by each bully. My assumption was that the research respondents would share these same experiences.

However, as I began to engage in the research, the very first written narratives began to suggest to me that this phenomenon of workplace bullying differed from person to person and that the perspectives were widely varied. As I began to engage in the interviewing process, interviews that were initially scheduled for 30 minutes quickly expanded to 45 minutes, one hour, and even beyond. Many of the participants came back for second and third interviews and continued informal discussions with me about this research anytime they would see me. I found that as the initial time approached for each interview and I told the participants I did not want to take more of their time than they had agreed to, in every instance, they all wanted to continue talking to me. The participants wanted to share their experiences and the experiences

of other targets that they had witnessed. I also found that the tactics used by workplace bullies were even wider and more varied than my initial expectations.

As a result, I decide that there was much more insight to be gained from these interviews and focus groups than I initially expected. For this reason, I decided to focus on the initial piece of the CMS study—insight and the initial question of CSR studies—“What is?” Also in line with this, I felt that if I could find instances of workplace bullying that clearly violated the target’s right to dignity, yet fell outside of the established definitions of workplace bullying, that this alone would be a major contribution to this field of study. I felt that by the time I finished the first in-depth interview I had already accomplished this. As I continued the interviews I found more and more instances of bullying that did not fit neatly into the definitions established through prior research and even international statutes. By the time I finished the tenth interview, I did feel that themes had been established, but that the stories continued to be unique. The next six interviews and the three focus groups helped to confirm these themes and continued to show that a single static definition of workplace bullying was hard to find.

However, I was able to establish a working definition that I felt would have to be flexible through the in-depth interviews. I was also very pleased that during the course of all three focus groups, the participants felt that the definition developed through the in-depth interviews was the best definition of workplace bullying. I was concerned that since their experiences had been so different, the possibility of coming up with a consensus definition was minimal.

Once this definition was developed and tested through the focus groups, I felt that this could be a very major contribution to this field of study. As a result I decided I would like to continue to test this definition as the next steps of my research journey. At the same time, I felt that further testing of this definition and further exploration of

the critique and or transformative redefinition steps would only clutter my dissertation and take away from the valuable information that had been gained in the course of this study. However, I did want to continue to gain insight and to answer the question of what is, in terms of the environment of remedial action available to these targets. I felt that this was an appropriate additional piece of this research, first because this was still a first step of a CMS study, but also because this was a question that the research participants were also interested in exploring. Therefore, I decided to complete this “what is” piece and to leave the critique and transformative redefinition sections as more of an analysis of potential future research and concepts.

As a result I began to explore the US legal system and the potential remedies for workplace bullying. I have always been a critic of the US response to workplace harassment, but in the course of this exploration I myself was shocked by many of the heightened standards imposed on plaintiffs and targets of workplace harassment. To me, it became clear very early that the US legal system was far from protecting employees’ human rights in the workplace.

Finally, when I started this research, I was not sure that workplace bullying would leave me an ongoing research agenda. However, the more information I received from research participants, the more I saw additional potential avenues for future research. I now look at this research agenda as a career-plus of research and have already begun to look for others to engage in this research on workplace bullying. I continue to focus on my primary goal of eliminating bullying from the workplace and protecting employees’ human rights to dignity, voice, esteem, etc. I believe that in order to get to this goal, it will take a social movement and hence collective action. I believe that engaging the labor movement in exploring this issue will be an important step as well as educating working people about bullying and that work does not have to hurt (in the words of Namie and Namie). This is beyond the

reach of any one researcher or even small collection of researchers, and I would hope that if nothing else, this work, as well as my future work on workplace bullying, will interest others to explore this topic; to critique our current system of work, politics, and the law; and to develop different transformative definitions and paths to bridge that gap between where we are and where we should be.

APPENDIX B:
NAQ BASED SURVEY

Research Participant Information Sheet

Control #:_____

Gender:_____

Age:_____

Major:_____

Most Recent Employer and Job title:_____

Hometown (City, State,Country):_____

Political Affiliation:_____

Socio-economic Status:

My Current household status is:

- _____ Lower class
- _____ Lower Middle Class
- _____ Middle Class
- _____ Upper middle Class
- _____ Upper Class

Growing up my family's status was:

- _____ Lower Class
- _____ Lower Middle Class
- _____ Middle Class
- _____ Upper middle class
- _____ Upper class

Workplace Climate Survey

1. During Grade School and/ or High School I was the target of bullying:
 - a. Never
 - b. Now and then
 - c. Monthly

- d. Weekly
 - e. Daily
2. During grade/school/high school I engaged in bullying:
- a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily
3. My high school had a policy against bullying
- a. Yes
 - b. No
 - c. Don't know
4. My high school strongly enforced a policy against bullying
- a. Strongly agree
 - b. Agree
 - c. Neutral
 - d. Disagree
 - e. Strongly disagree
5. School place bullying is not a big deal
- a. Strongly agree
 - b. Agree
 - c. Neutral
 - d. Disagree
 - e. Strongly disagree
6. Workplace bullying is not a cause for concern
- a. Strongly agree
 - b. Agree
 - c. Neutral
 - d. Disagree
 - e. Strongly disagree
7. I have been mistreated at work
- a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily

8. I have been bullied at work
 - a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily
9. Someone at work has withheld information that affected my performance
 - a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily
10. I have received unwanted sexual attention at work
 - a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily
11. I have been humiliated or ridiculed in connection with my work
 - a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily
12. I have been ordered to do work below my level of competence
 - a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily
13. I have had key areas of work responsibility replaced with trivial or unpleasant tasks
 - a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily

14. I have had gossip or rumors spread about me at work
- a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily
15. I have been ignored or excluded at work
- a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily
16. I have had insulting remarks made about my person at work
- a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily
17. I have been shouted at or the victim of spontaneous anger at work
- a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily
18. I have been the target of intimidating behavior such as finger-pointing, invasion of my personal space, blocking the way at work
- a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily
19. I have received hints or signals from others that I should quit my job
- a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily

20. I have received threats of violence or physical abuse at work
- a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily
21. I have received repeated reminders of my mistakes or errors at work
- a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily
22. I have received persistent criticism of my work
- a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily
23. I have received insulting telephone calls/messages/e-mail at work
- a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily
24. I have been systematically required to perform jobs/tasks outside of my job description
- a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily
25. I have been given tasks with unreasonable or impossible targets
- a. Never
 - b. Now and then
 - c. Monthly
 - d. Weekly
 - e. Daily

26. I have experienced excessive monitoring of my work

- a. Never
- b. Now and then
- c. Monthly
- d. Weekly
- e. Daily

27. I have been pressured to not claim rights I am entitled to at work

- a. Never
- b. Now and then
- c. Monthly
- d. Weekly
- e. Daily

28. I have been exposed to an unmanageable workload

- a. Never
- b. Now and then
- c. Monthly
- d. Weekly
- e. Daily

I would be willing to discuss my answers and experiences with work further as part of an on-going research project.

_____ Yes

_____ No

If yes, the best way to contact me is at: _____

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